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Supreme Court of the United States

OCTOBER TERM, 1950

No. 310

**CALIFORNIA STATE AUTOMOBILE ASSOCIATION
INTER-INSURANCE BUREAU, APPELLANT,**

vs.

**WALLACE K. DOWNEY, INSURANCE COMMIS-
SIONER OF THE STATE OF CALIFORNIA**

**APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF
CALIFORNIA, FIRST APPELLATE DISTRICT**

FILED SEPTEMBER 16, 1950.

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**IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE CITY AND
COUNTY OF SAN FRANCISCO, DEPARTMENT
NUMBER TWO, HONORABLE EDWARD P. MUR-
PHY, JUDGE**

No. 374555

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE
BUREAU, Petitioner,

vs.

WALLACE K. DOWNEY, Insurance Commissioner of the State
of California, Respondent

Clerk's Transcript

APPEARANCES:

For the Petitioner: Messrs. Brobeck, Phleger & Harrison,
111 Sutter Street, San Francisco, California.

For the Respondent: Hon. Fred N. Howser, Attorney
General, by T. A. Westphal, Jr., Deputy and Harold B.
Haas, Deputy, 600 State Building, San Francisco, Califor-
nia.

[fol. 4] [File endorsement omitted]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

PETITION FOR WRIT OF MANDATE—Filed March 22, 1948

To the Honorable the Superior Court of the State of Cali-
fornia, in and for the City and County of San Francisco:

The petition of California State Automobile Association
Inter-Insurance Bureau, respectfully shows:

1. California State Automobile Association Inter-Insur-
ance Bureau, the petitioner herein, is and was at all times
herein mentioned a reciprocal or inter-insurance exchange
organized and existing under the provisions of Chapter 3,
Part 2, Division 1, of the Insurance Code, and permitted to
transact liability insurance business in this State, and it is
the holder of a certificate of authority issued by the Insur-

ance Commissioner of the State of California to transact said class of insurance business in this State for the year July 1, 1947 to July 1, 1948.

2. The petitioner has been so organized and existing and has been transacting such business continuously since the year 1914.

3. California State Automobile Association is and at all times herein mentioned has been a corporation organized and existing under the laws of the State of California. It was organized in the year 1907 for the purpose of advancing the interests of the motoring public, and it is ~~and~~ at all [fol. 5] times herein mentioned has been a motor club within the meaning of Part 5 of Division 2 of the Insurance Code. It has a membership of over 100,000 citizens of the State of California.

4. Petitioner was formed and organized in the year 1914 solely for the purpose of making insurance available to members of California State Automobile Association, and has at all times thereafter existed solely for that purpose. From its inception it has at all times been and it is its basic underwriting policy that "only members in good standing of the California State Automobile Association or corporations or firms in which such members are officers or partners shall be eligible to apply for insurance in the Bureau."

5. On March 19, 1948, the respondent herein, Wallace K. Downey, as Insurance Commissioner of the State of California, issued a certain "decision" ordering that the Certificate of Authority of the California State Automobile Association Inter-Insurance Bureau to transact liability insurance be suspended. A copy of said decision is attached hereto as Exhibit 1 and made a part hereof. Said decision of the respondent is invalid and void as hereinafter more particularly appears.

6. The said decision purports to have been issued by reason of the failure of petitioner to subscribe to a certain "California Automobile Assigned Risk Plan" claimed by the respondent to have been issued pursuant to the provisions of Article 4, Chapter 1, Part 3, Division 2, of the Insurance Code of the State of California, being Sections 11620 to 11627, inclusive, enacted in the year 1947 and constituting Chapter 1205 of the 1947 Statutes of the State of California. Said plan is set forth as Article 8 of Title 10, California Administrative Code, being Sections

2400 to 2498, inclusive, thereof, and is captioned "California Automobile Assigned Risk Plan." A copy thereof is attached hereto as Exhibit 2 and is made a part hereof.

7. Said statute purports to require insurers to issue insurance and accept risks against their will, and said statute, and the aforesaid plan purported to have been issued thereunder, and the decision of the Insurance Commissioner hereinabove referred to are and each of them is unconstitutional and void and violates each of the following provisions of the Constitution of the United States:

(a) The 14th Amendment as constituting a law depriving persons, and particularly your petitioner and its members, of property and liberty without due process of law.

(b) Section 10 of Article I as constituting a law impairing the obligation of contracts.

8. Said statute purports to require insurers to issue insurance and accept risks against their will, and said statute, and the aforesaid plan purported to have been issued thereunder, and the decision of the insurance Commissioner here-[fol. 7] inabove referred to, are and each of them is unconstitutional, void and violates each of the following provisions of the Constitution of the State of California.

(a) Section 13 of Article I as constituting a law depriving persons, and particularly your petitioner and its members, of property and liberty without due process of law.

(b) Section 16 of Article I as constituting a law impairing the obligation of contracts.

(c) Section 1 of Article III, inasmuch as it purports to delegate to the respondent, said Insurance Commissioner, the exercise of powers properly belonging to the legislative department.

9. Said plan issued by the Insurance Commissioner was not issued pursuant to or in conformity with the said statute, nor was it authorized by the said statute, but was issued in violation thereof in the following respects:

Section 11621 of the Insurance Code provides that "Insofar as possible assignments under plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber." Said plan expressly violates

said section of the statute by reason of the provisions of Sections 2445.1 and 2445.15 of said plan. The plan is inconsistent with the underwriting policies of the petitioner, to wit: the policy hereinabove set forth limiting insurance to members of California State Automobile Association or corporations [fol. 8] portions or firms of which sued members are officers or partners.

10. If the provision of the statute that "insofar as possible assignments under plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber" does not, when properly construed, exempt your petitioner from accepting assignments of risk of persons who are not members of California State Automobile Association, said statute is void for uncertainty and ambiguity, and for that reason in addition to any other, said statute, the enforcement thereof, said plan, and the decision of the Insurance Commissioner herein referred to, and each of them, violates the said 14th Amendment of the Constitution of the United States, and Section 13 of Article I and Section 1 of Article III of the Constitution of the State of California.

11. The said decision of respondent was made as the result of a proceeding in which by a law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the respondent, and in fact such proceeding was had on March 5, 1948 and evidence was at that time taken therein.

12. Unless this Court stays the operation of the said decision pending the judgment of the Court herein, your petitioner will be unable to transact any business and its business and property will be irreparably injured without any opportunity having been given to petitioner to have [fol. 9] its day in court for the purpose of having determined the validity of the plan under the statute or the constitutionality of the statute under the Constitutions of the United States and the State of California.

13. Your petitioner has heretofore, pursuant to the provisions of Section 11523 of the Government Code, requested the respondent to prepare and deliver to it within 30 days the complete record of the proceedings as the result of which said decision was made.

14. In making and issuing said decision respondent has proceeded without and in excess of jurisdiction in that (a) he has acted under an unconstitutional statute, as

stated above, and (b) he has acted under a plan issued by him in violation of and not in conformity with the statute, and without statutory authority and warrant, as stated above.

15. The respondent committed a prejudicial abuse of discretion in that:

(a) Finding II of his decision is erroneous and unsupported by the evidence insofar as it finds that the plan issued by respondent was issued "pursuant to the provisions of Article 4, Chapter 1, Part 3, Division 2, of the Insurance Code of the State of California, being Sections 11620 to 11627, inclusive, thereof", and in finding that the said plan was "for the equitable apportionment among insurers admitted [fol. 10] to transact liability insurance, of those applicants for automobile, bodily injury, and property damage liability insurance who are in good faith entitled to, but are unable to procure such insurance through ordinary methods."

(b) Finding II is further erroneous in finding that "This Plan * * * is reasonable."

(c) The decision is not supported by the findings in that it erroneously concludes that your petitioner has violated the provisions of Section 11625 of the Insurance Code in failing to subscribe to said California Automobile Assigned Risk Plan.

(d) The decision is not supported by the findings in that it erroneously determines that your petitioner was required by Section 11620 of said Insurance Code and Section 2498 of Title 10, Article 8 of the California Administrative Code, to subscribe to said plan.

(e) The decision is not supported by the findings in that it erroneously orders the certificate of authority of your petitioner to transact liability insurance to be suspended.

16. At said hearing which occurred on March 5, 1948, the Hearing Officer improperly excluded evidence (both oral and documentary) and proof offered by petitioner herein (the respondent at said hearing), to wit: all evidence [fol. 11] offered by your petitioner and excluded as shown by the record of the proceedings thereof, which

record has been requested of respondent by petitioner and which upon presentation thereof will be filed herein.

Wherefore, your petitioner prays

(1) That this Honorable Court make an order directing the respondent to file in this Court the complete record of the proceedings as the result of which the said decision was made;

(2) That this Honorable Court inquire into the validity of the said decision;

(3) That it be ordered, adjudged and decreed that said decision is invalid and void and that the same be annulled and set aside, and that your petitioner be restored to its right to transact insurance business under the provisions of the Insurance Code;

(4) That this Honorable Court make its order staying the operation of the said decision pending the judgment of the Court herein; and

(5) For such other and further relief as may be meet and proper in the premises.

(S.) Brobeck, Phleger & Harrison, Attorneys for
Petitioner.

[fol. 12] *Duly sworn to by George Chalmers. Jurat omitted in printing.*

[fol. 13] EXHIBIT 1 TO PETITION

Order of Suspension No. S. F. 5337 A

In the Matter of the Certificate of Authority to Transact
Liability Insurance of CALIFORNIA STATE AUTOMOBILE
ASSOCIATION INTER-INSURANCE BUREAU, Respondent

Decision

The attached Proposed Decision of the Hearing Officer is hereby adopted by the Insurance Commissioner as his decision in the above-entitled matter.

It appearing to the Insurance Commissioner from the provisions of Section 11625 of the Insurance Code that insurers who fail to comply therewith should not be permitted to transact liability insurance in this State, it is

hereby ordered that this Decision shall be effective immediately upon its service on the Respondent herein, and, pursuant thereto, the certificate of authority of the California State Automobile Association Inter-Insurance Bureau to transact liability insurance is hereby suspended from the time of such service until the Respondent subscribes to the plan, referred to in the said Proposed Decision, pursuant to the provisions of Section 11625 of the Insurance Code.

It is so ordered this 19th day of March, 1948.

[S.] Wallace K. Downey, Insurance Commissioner.

[fol. 14] STATE OF CALIFORNIA DEPARTMENT OF INSURANCE

No. S.F. 5337-A

In the Matter of the Certificate of Authority to Transact Liability Insurance of CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTERINSURANCE BUREAU, Respondent

Proposed Decision

Pursuant to due notice a hearing on an Accusation in the above-entitled matter came on regularly before John G. Clarkson, Hearing Officer, at San Francisco, California, on March 5, 1948. The Insurance Commissioner was represented by Frank Fullenwider, Esq., Deputy. Respondent was represented by Brobeck, Phleger and Harrison, attorneys at law, appearing through Maurice E. Harrison, Esq., and Moses Laskey, Esq., of San Francisco. Evidence both oral and documentary was adduced, the matter submitted, and upon due consideration thereof, the Hearing Officer makes the following findings of fact:

I

California State Automobile Association Inter-insurance Bureau is admitted to transact liability insurance and is the holder of a certificate of authority issued by the Insurance Commissioner of the State of California to transact the said class of insurance in this State for the year July 1, 1947-July 1, 1948.

[fol. 15]

II

The Insurance Commissioner of the State of California, pursuant to the provisions of Article 4, Chapter 1, Part 3, Division 2 of the Insurance Code of the State of California, being Sections 11620 to 11627, inclusive, thereof, did, after public hearing on due notice, approve and issue a plan for the equitable apportionment among insurers admitted to transact liability insurance, of those applicants for automobile, bodily injury, and property damage liability insurance who are in good faith entitled to, but are unable to procure such insurance through ordinary methods.

This Plan, published as Article 8 of Title 10, California Administrative Code, being Sections 2400 to 2498, inclusive, thereof, and captioned "California Automobile Assigned Risk Plan," is reasonable.

III

A copy of said Plan was mailed to the respondent herein on or about December 16, 1947, by said Insurance Commissioner. The Plan declared that it was to be, and it became effective at 12:01 A. M., Pacific Standard Time, on January 19, 1948. Said Plan contains a form of subscription agreement to be signed by all persons then admitted to transact liability insurance in the State of California, including respondent herein. Said plan directed all such persons, including respondent, to subscribe thereto on or before the effective date of said Plan.

[fol. 16]

IV

Respondent herein has wholly failed to subscribe to said Plan on or before January 19, 1948, or at all:

V

Said Insurance Commissioner on January 20, 1948, mailed a notice to the respondent herein at its address, 150 Van Ness Avenue, San Francisco 2, California, to subscribe to the said Plan, and the said notice was received by the respondent herein on January 21, 1948; the said notice required subscription to said Plan on or before February 1, 1948.

VI

Respondent herein has wholly failed to comply with the notice referred to in Finding V hereof, or to subscribe to the said Plan on or before February 1, 1948, or at all.

.

Pursuant to the foregoing findings, the Hearing Officer makes the following determination of the issues presented:

I

Respondent herein is an insurer admitted to transact liability insurance in the State of California.

II

Respondent herein has violated the provisions of Section 11625 of the Insurance Code of the State of California in that it has failed to subscribe to the California Automobile Assigned Risk Plan as required by Section 11620 of the said Insurance Code and Section 2498 of Title 10, Article 8 [fol. 17] of the California Administrative Code; and has failed to subscribe to the said Plan on or before February 1, 1948, pursuant to the ten-day written notice to respondent requiring its subscription to the said Plan.

.

Wherefore, the Hearing Officer proposes the following order:

(1) That the Certificate of Authority to transact liability insurance of California State Automobile Association Interinsurance Bureau, respondent herein, be and the same is hereby suspended until said respondent does subscribe to the said Plan pursuant to the provisions of Section 11625 of the said Code.

(2) That this proposed decision, if adopted by the Insurance Commissioner, shall become effective upon the date ordered by the Insurance Commissioner.

I hereby certify that the foregoing constitutes my proposed decision in the above-entitled matter as a result of the hearing had before me on March 5, 1948, at San Francisco, California, and I hereby recommend its adoption as

the decision of the Insurance Commissioner of the State of California.

Dated: March 9, 1948.

John G. Clarkson, Hearing Officer.

[fol. 18]

EXHIBIT 2 TO PETITION

Rules and Regulations of the Insurance Commissioner Approving and Issuing a Reasonable Plan for the Equitable Apportionment, Among Insurers Admitted to Transact Liability Insurance, of Those Applicants for Automobile Bodily Injury and Property Damage Liability Insurance Who Are in Good Faith Entitled to but Are Unable to Procure Such Insurance Through Ordinary Methods

California Administrative Code

Title 10. Investment

Chapter 5. Insurance Commissioner

Sub-Chapter 3. Insurers

Article 8. California Automobile Assigned Risk Plan

General

2400. This Plan consists of the rules and regulations contained in this Article and is approved and issued by the Insurance Commissioner pursuant to Article 4, Chapter 1, Part 3, Division 2 of the Insurance Code.

(a) To provide a means by which risks of applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to such insurance but are unable to procure it through ordinary methods may be assigned to insurers, admitted to transact liability insurance, and

(b) To establish a procedure for the equitable apportionment of such applicants among all such insurers for insurance of such risks.

2401. This Plan and the instrumentality through which it is administered shall be known as the "California Automobile Assigned-Risk Plan."

[fol. 19] 2402. This Plan shall take effect at 12:01 A.M., Pacific Standard Time, on January 19, 1948.

2403. Unless the context otherwise requires, as used herein

(a) "Insurer" means an insurer required to participate in this Plan.

(b) "Commissioner" means the Insurance Commissioner.

(c) "Automobile" refers to the automobile incident to whose ownership, operation, maintenance, or use the liability hazards sought to be insured against exist.

(d) "Vehicle" and "Motor Vehicle" mean "vehicle" and "motor vehicle", respectively, as defined in the Vehicle Code.

(e) "Registered", "registration", "operator's license", and "chauffeur's license" have the same meanings as they have in the Vehicle Code.

2404. This Plan shall be available to all residents of California, and to all non-residents, with respect to ownership, operation, maintenance or use of automobiles registered in the State of California.

2405. Subject to the provisions of Section 11621 of the Insurance Code and Section 2449 of this Article, every insurer admitted to transact liability insurance shall participate in this Plan.

2406. Every policy of automobile liability insurance issued pursuant to assignment under this Plan shall provide [fol. 20] coverage in an amount not less than \$5,000 for bodily injury to or death of each person as a result of any one accident and, subject to said limit as to one person, in an amount not less than \$10,000 for bodily injury to or death of all persons as a result of any one accident, and in an amount not less than \$5,000 for damage to property of others as a result of any one accident.

2407. Such policy shall afford standard coverage and restrictive endorsements shall not be employed;

(a) except for the purpose of eliminating the Automatic Renewal Clause.

(b) except as provided in Section 2438.

(c) unless approved by the Governing Committee and not in defeasance of the purposes of the Plan and the statute under which it is approved and issued.

Administration

2420. The Plan shall be administered by a Governing Committee and a Manager who shall establish an administrative office in San Francisco and a branch office in Los Angeles.

2421. The Governing Committee, sometimes herein referred to in the Plan as the Committee, shall consist of five persons, each representative of one of the following groups or classes of insurers:

(a) Insurers members of the National Bureau of Casualty Underwriters.

(b) All other stock insurers.

[fol. 21] (c) Insurers members of the National Association of Automotive Mutual Insurance Companies.

(d) All other mutual insurers.

(e) Reciprocal or interinsurance exchanges.

2421.1. (a) During the first three months, or less, following the effective date of this Plan the Committee shall be comprised, until the election of their successors, of those five representatives of the groups or classes of insurers described in Section 2421 who constitute, on January 17, 1948, the Governing Committee of the voluntary California Automobile Assigned Risk Plan then in existence.

(b) Within such three months' period, on a date fixed by the Committee, and annually thereafter at an annual meeting on a date fixed by the Committee, called upon not less than 20 days' notice in writing to all insurers, the Committee shall be elected by the insurers. A majority of the insurers shall constitute a quorum and voting by proxy shall be permitted.

(c) At such annual meeting each respective group or class of insurers shall elect a member of the Committee, and an alternate to serve in his absence, but if it fails to do so, all insurers in attendance at such meeting shall elect from the group or class so failing a member of the Committee and an alternate, to be representative of such group or class.

2421.15 The Committee shall meet as often as it deems necessary, but not less than once a month on a date fixed by it, for the purpose of reviewing assignments by the Manager and performing the general duties of administration [fol. 23] of the Plan. Three members of the Committee shall constitute a quorum for the transaction of business.

2421.2. The Committee shall select and appoint a Manager of the Plan and shall fix and determine his compensation and the compensation of such other employees as the Manager may employ with its approval.

2421.3. The Committee shall keep a record of all of its proceedings and shall have power and authority to administer the Plan and shall be responsible for all property of the Plan.

2421.4. The Committee shall have authority to budget estimated expenses and costs of administering the Plan and to levy assessments therefore upon the insurers. It shall collect all fees, assessments and other money payable to the Plan and deposit same in a bank designated by it to the credit of the California Automobile Assigned Risk Plan and shall keep proper account of all such funds.

2421.5 The Committee shall have authority to disburse the funds of the Plan in payment of necessary expenses for the administration of the Plan.

2421.6. The Committee may designate one or more individuals to sign checks and drafts in the name and on behalf of the California Automobile Assigned Risk Plan Governing Committee in the transaction of its business, subject to such approval as the Committee may determine. It shall require each person authorized to sign checks and drafts on its behalf to give bond with an admitted surety insurer [fol. 23] as surety in such penal sum as the Committee determines, for the faithful and honest discharge of his duties and for the faithful and honest receipt, custody and disbursement of the funds of the Plan.

2421.7. The Committee shall keep such records and make such reports as are required by Sections 2494 and 2494.5.

2421.8. The Committee shall faithfully and impartially perform and exercise the functions and duties elsewhere in this Plan vested in and imposed upon it.

2421.9. After consultation with the insurers, the Committee may submit to the Insurance Commissioner for approval recommendations for amendments to this Plan.

2422. The Manager shall be the administrative executive of the Plan and shall serve at the pleasure of and be subject to the direction of the Committee. He shall make all assignments under the Plan and faithfully and impartially perform the functions and duties elsewhere in this Plan vested in and imposed upon him and shall keep such statistics and records and make such reports as are required or authorized by Sections 2492 and 2492.5, both inclusive. With the approval of the Committee he may employ such assistance as may be necessary to the efficient operation of the Plan.

Eligibility

2430. This Plan shall apply only to risks of applicants who are in good faith entitled to automobile bodily injury and property damage liability insurance but are unable to [fol. 24] procure it through ordinary methods. Except as otherwise provided in Sections 2431 to 2437, both inclusive, an applicant shall be deemed to be in good faith entitled to insurance.

2431. An applicant is not in good faith entitled to insurance if, during the three-year period immediately preceding the date of the application the applicant or anyone who normally or usually drives the automobile has been convicted more than twice for one, or more than once each for two, of the following offenses:

(a) Driving a vehicle while intoxicated or under the influence of intoxicating liquor in violation of Section 502 of the Vehicle Code.

(b) Driving a vehicle in a reckless manner where injury to person or damage to property actually results therefrom.

(c) Driving a vehicle at an excessive rate of speed where injury to person or damage to property actually results therefrom.

2431.1. An applicant is not in good faith entitled to insurance if, during the three-year period immediately preceding the date of application, the applicant or anyone who normally or usually drives the automobile has been con-

victed more than once of one, or once each for two or more, of the following offenses:

(a) Failing to stop and report when involved in an [fol. 25] accident as required by Section 480 of the Vehicle Code.

(b) Manslaughter or negligent homicide resulting from the operation of a vehicle.

(c) Theft or unlawful taking of a vehicle in violation of Section 503 of the Vehicle Code, or grand theft of a vehicle.

(d) Any felony in the commission of which a motor vehicle is used.

(e) Driving while under the influence of intoxicating liquor and causing the death of or bodily injury to any person in violation of Section 501 of the Vehicle Code.

(f) Operation of a motor vehicle during period of revocation or suspension of registration or operator's license.

(g) Permitting any unlawful use of an operator's or chauffeur's license, or any other offense under Section 338 of the Vehicle Code.

2431.15. An applicant is not in good faith entitled to insurance if, during the three-year period immediately preceding the date of the application the applicant, or anyone who normally or usually drives the automobile has been addicted to the use of, or has been convicted of being under the influence of, narcotics or other drugs.

2431.2. An applicant is not in good faith entitled to insurance if, during the three-year period immediately [fol. 26] preceding the date of the application the applicant or anyone who normally or usually drives the automobile has been convicted more than once for any one, or once each for more than one, of the offenses listed under Section 2431 and once for any of the offenses listed under Section 2431.1.

2431.25. An applicant is not in good faith entitled to insurance if, upon the basis of investigation by the insurer to which the risk is assigned, it is determined to the satisfaction of the Committee that the applicant or anyone who normally or usually drives the automobile habitually uses alcoholic beverages to excess:-

2431.3. An applicant is not in good faith entitled to insurance if, upon the basis of investigation by the insurer to which the risk is assigned, it is determined to the satisfaction of the Committee that the applicant has wilfully failed to fully disclose in his application his record of such serious motor vehicle accidents or traffic violations as are material to the acceptance of the risk.

2431.35. An applicant is not in good faith entitled to insurance if, upon the basis of investigation by the insurer to which the risk is assigned, it is determined to the satisfaction of the Committee that the applicant has operated a motor vehicle during the period of revocation or suspension of his operator's license, on more than one occasion.

2431.4. An applicant is not in good faith entitled to insurance if, upon the basis of the investigation by the [fol. 27] insurer to which the risk is assigned, it is determined to the satisfaction of the Committee that the automobile is so defective in respect to brakes, lights, tires, horn, windshield, steering mechanism or general condition as to endanger public safety, and the Committee has required that the necessary repairs be made as a condition to acceptance, but the applicant has failed to submit a certificate from a reputable repair shop stating that such necessary repairs have been so made and completed.

2431.45. An applicant is not in good faith entitled to insurance if, during the 12 months' period immediately preceding the date of application, the applicant has intentionally registered a motor vehicle in this State illegally; or has made false statements in the license application or registration as to name or address; or has impersonated an applicant for license or registration or procured an impersonation whether for himself or for another.

2431.5. An applicant is not in good faith entitled to insurance if the applicant or anyone who normally or usually drives the automobile, has failed to meet all obligations to pay automobile bodily injury and property damage liability insurance premiums contracted during the previous 12 months.

2431.55. An applicant is not in good faith entitled to insurance if the applicant or anyone who normally or usually drives the automobile, or anyone who drives it with

the express or implied consent of the applicant, has a [fol. 28] major mental or physical disability.

2431.6. An applicant is not in good faith entitled to insurance if the risk consists of or includes a vehicle used in carrying passengers for hire or compensation.

2431.65. An applicant is not in good faith entitled to insurance if the risk consists of or includes a vehicle used in the transportation of explosives, gasoline, or other highly inflammable or explosive liquids, gases or materials.

2431.7. An applicant is not in good faith entitled to insurance if the risk consists of or includes any authorized emergency vehicle owned by the United States, the State of California or any political subdivision or municipality thereof, or the applicant is a person qualifying as a self-insurer under Section 420.7 of the Vehicle Code.

2431.75. An applicant is not in good faith entitled to insurance if the applicant or anyone who normally or usually drives the automobile is under 18 years of age on the date of application or renewal and no finding has been made by the Committee upon the recommendation of the Manager that serious and unavoidable hardship will result from inability to obtain insurance.

2431.8. An applicant is not in good faith entitled to insurance if, upon the basis of investigation by the insurer to which the risk is assigned, it is determined to the satisfaction of the Committee that the accident record, conviction record (criminal and traffic), age, and physical, mental, [fol. 29] or other condition of the applicant or anyone who normally or usually drives the automobile, considered as a whole, are such that his operation of an automobile would endanger public safety.

2431.85. An applicant is not in good faith entitled to insurance if, upon the basis of investigation of the experience physical or other condition of the risk by the insurer to which it is assigned, the Committee believes that reasonable doubt exists as to whether the applicant or anyone who normally or usually drives the automobile should continue to be licensed to operate a motor vehicle in this State and requests the Director of Motor Vehicles to re-certify the ability of such applicant or person to con-

tinue to hold an operator's license, but the Director has not so re-certified.

2431.9. (a) Unless one year has elapsed from the date of the rejection or cancellation, or the cause of rejection or cancellation has ceased to be valid by reason of passage of time, an applicant is not in good faith entitled to insurance, if the risk, after assignment under the Plan, has been rejected by the designated insurer for cause and the rejection has been sustained, or the policy, after insurance pursuant to assignment, has been cancelled in accordance with Sections 2470 to 2471.

(b) This section shall not limit the scope and effect of any other section of this Plan.

2432. Deafness, partial or total, and deafness and [fol. 30] dumbness, do not constitute major physical disabilities if all conditions endorsed upon the operator's license of an applicant or other person so disabled requiring special equipment (such as convex or full-view or outside mirrors) are complied with and such applicant cites the special equipment in use and information respecting any restriction on operator's license when submitting application for coverage. Each such risk shall be subject to individual consideration on its merits by the Committee, however, and shall not be in good faith entitled to insurance if the committee is satisfied that the condition of the applicant or other operator is such that his operation of an automobile would endanger public safety.

2433. The loss or loss of use of part or all of an arm or leg does not constitute a major physical disability if the member is replaced by an artificial limb, or special equipment is placed on the automobile and the applicant or other operator passes a special operator's license test of the State. Applicants on such risks shall cite any special equipment in use and information respecting any restriction on operator's license when submitting application for assignment.

2434. The loss of the sight of one eye does not constitute a major physical disability.

2435. Applicants or other operators subject to cardiac or similar conditions which might result in loss of consciousness or control are subject to investigation on the

merits by the Committee and may be required to submit [fol. 31] certificates, satisfactory to the Committee, from at least two qualified medical doctors before assignment to a designated carrier or acceptance of such risks.

2436. Epilepsy shall be considered a major mental or physical disability.

2437. The loss or loss of use of all or part of two legs, two arms, or one arm and one leg shall be considered a major physical disability. However, such risks shall be given individual consideration by the Committee and may be assigned if the Committee is satisfied that the condition of the applicant or other operator is such that his operation of an automobile would not endanger public safety.

2438. If an applicant is ineligible solely by reason of the operation of the automobile by a person or persons other than himself, he may become eligible by agreeing to accept a policy excluding all coverage while the automobile is being operated by such other person or persons. The designated insurer may attach to its policy an endorsement to accomplish this purpose.

Applications

2440. Any applicant for automobile bodily injury and property damage liability insurance who is in good faith entitled to such insurance but is unable to procure it through ordinary methods, may apply for assignment to an insurer under this Plan.

2441. The application for assignment under this Plan [fol. 32] must be signed in every case by the applicant, but may be submitted by the applicant or a licensed producer of record designated by him to act on his behalf.

2442. The application shall be filed in duplicate with the Manager on a form prescribed by the Committee and shall include:

(a) A statement by the applicant to the effect that he has attempted but has been unable to secure automobile bodily injury and property damage liability insurance in this State.

(b) Complete underwriting and character information, and complete financial information where the cov-

erage sought is to be written on a basis requiring final adjustment of the premium subsequent to the expiration of the policy.

(c) A statement by the applicant in cases where the insurance is to be written on a basis requiring final adjustment of the premium after expiration of the policy that he will maintain a complete record of his financial transactions in such reasonable form and manner as the insurer may require and that such record will be available for inspection by the insurer at a designated place and at all reasonable times.

(d) An agreement by the applicant to comply with all reasonable recommendations of the insuring insurer made with the view to reducing the hazards of the risk.

[fol. 33] (e) An agreement by the applicant to remit to the designated insurer within 15 days of notification a certified check, money order, or bank draft payable to the insurer for the balance of the full premium for his policy.

(f) Certification of the application by affidavit of the applicant sworn to before a Notary Public or other person authorized to administer oaths.

2443. When filed the application must be accompanied by a certified check, money order or bank draft in the amount of Five Dollars and payable to the Plan, as an investigation fee. Such fee is not returnable but shall be credited against the premium if the risk is assigned and accepted and the applicant pays the balance of the premium in accordance with the Plan.

2444. Upon receipt of an application properly completed and executed and determination that the risk is eligible for assignment, the Manager shall designate an insurer and assign the risk to such insurer and so advise the producer of record.

2444.5 Upon assignment of a risk to an insurer, the Manager shall forward to such insurer the original application together with the prescribed investigation fee.

Basis and Method of Assignment

2445. The Manager shall, with due regard to exclusions under reinsurance agreements, treaties or contracts filed with him in writing, and with due regard to the facilities of [fol. 34] the designated insurers for servicing the risk, assign the risks which are eligible for assignment in such sequence and number that, as far as practicable, each insurer shall in the long run be given that number of assignments which bear to the total number of assignments the same ratio as the insurer's net direct automobile bodily injury premium writings in California bear to the total net direct automobile bodily injury premium writings in California of all insurers.

2445.1 Insofar as possible, assignments shall be consistent with the scope of territorial operations and underwriting policies of each insurer, of which the Manager shall have been notified in writing. Underwriting policy is policy founded on underwriting judgment of the hazards involved. Without in any way limiting or enlarging the meaning of the term "underwriting policy", policy excluding from insurance an applicant solely by reason of the fact of his non-membership in an organization is not underwriting policy. Underwriting policy excluding from insurance applicants solely by reason of facts or circumstances not sufficient to render them not in good faith entitled, under this Plan, to insurance is inconsistent with the purposes of this Plan and of the statute under which it is approved and issued.

2445.15. In the assignment of a risk when the applicant is a member of a Motor Club licensed under the provisions of Part 5, Division 2 of the Insurance Code, preference shall be given to an insurer which confines its underwriting of [fol. 35] risks not subject to the Plan to members of such Motor Club, and if such insurer accepts such assignment it shall receive credit under the Plan against its normal quota of assignments. No such insurer may refuse to accept an assignment because the applicant is not a member of such Motor Club. It is the purpose of this section to effectuate the purposes of this Plan and the statute under which it is approved and issued where the giving effect to policy other than underwriting policy within the meaning of section 2445.1 would otherwise defeat such purposes.

2446. Where a risk of an applicant consists of or includes two or more separate vehicles or units, each such vehicle or unit shall be counted as an assignment. Where it is not practical to assign each such vehicle or unit to a different insurer, the entire risk may be assigned to the same insurer but such insurer shall be credited with that number of assignments equal to the number of vehicles or units comprising the risk.

2447. Each renewal of an assigned risk as such pursuant to Sections 2482, 2482.5 and 2483.2 shall be counted as an assignment.

2448. For the purpose of assignment of risks to insurers, the Manager shall, from the effective date of the Plan to July 1, 1948, use the relation of the net direct automobile bodily injury premium writings in California of each insurer for the complete calendar year ending December 31, [fol. 36] 1946, to the total of such writings of all insurers for that year, and thereafter, during each year which commences on July 1st, shall use such writings of each such insurer for the complete calendar year which ended on the preceding December 31st in relation to the total of all of such writings for such year. In the event that such writings of a given insurer are not available for the complete calendar year above prescribed by reason of the admission of such insurer during such calendar year or otherwise, its writings shall be adjusted to an annual basis, using the period it actually wrote such business and its writings during such period in making the adjustment.

When an insurer is first admitted or first engages in such business, in order to arrive at a basis for assignments, it shall be presumed that its writings equal the net direct automobile bodily injury writings in California in such prescribed year of the insurer actually writing such business, who, during such year, had the least amount of such writings.

In the event of a merger or consolidation, the total writings of all of the parties to such merger or consolidation shall be used in making the calculations required by this section.

In making the calculations required by this section, the Manager may make corrections made necessary by the admission of new insurers into the automobile bodily injury

field, on a fair and equitable basis, but such corrections need not be made with absolute mathematical certainty.

[fol. 37] 2449. No assignments shall be made under the Plan to an insurer which

(a) Does not transact both automobile bodily injury liability insurance and automobile property damage liability insurance; or

(b) Has withdrawn from this State pursuant to and in compliance with Article 15, Chapter 1, Part 2, Division 1 of the Insurance Code; or

(c) Has discontinued and not resumed the execution of new or renewal contracts of automobile bodily injury and property damage liability insurance and has notified the Commissioner of such discontinuance.

2449.1. Any insurer which after notification to the Commissioner pursuant to Section 2449 resumes the execution of new or renewal contracts of automobile bodily injury and property damage liability insurance shall immediately notify the Commissioner of such resumption.

2449.15. The Commissioner shall promptly inform the Manager of any notifications received by him pursuant to Sections 2449 and 2449.1.

Acceptances and Rejections

2450. Within twenty days after receipt of notice of designation from the Manager, the designated insurer shall either:

(a) Accept the assignment and notify the applicant that if the balance of the full premium as stated in such [fol. 38] notice is received within 15 days or within such further reasonable period as the insurer may agree to, it will issue a policy of automobile bodily injury and property damage liability insurance to become effective 12:01 A. M. of the day following the day on which such premium as stated in such notice is actually received by the insurer; or

(b) Notify the Manager and the applicant, or his producer of record, that it believes that the applicant is not in good faith entitled, under the Plan, to insur-

ance in which event the reasons underlying such belief shall be furnished the Manager.

2450.1. If notification is filed with the Manager pursuant to paragraph (b) of Section 2450, he shall, within five days after receipt of such notification, review the application and all the facts and circumstances surrounding the risk and make a finding whether or not the applicant is in good faith entitled, under the Plan, to insurance, which finding he shall communicate to the designated insurer and the applicant or his producer of record.

2450.3. Within five days after the receipt of a communication from the Manager pursuant to Section 2450.1 that he finds that the applicant is in good faith entitled, under the Plan, to insurance, the designated insurer shall accept the assignment and notify the applicant in accordance with paragraph (a) of Section 2450.

[fol. 39] 2450.5. Each notification in accordance with paragraph (a) of Section 2450 shall include a statement of the total amounts which the applicant is required to pay for the coverage and a copy of each such notification shall be sent by the designated insurer to the Manager and to the producer of record.

2451. Upon receipt of the balance of the full premium within the time specified in its notification in accordance with paragraph (a) of Section 2450, the designated insurer shall issue a policy of automobile liability insurance pursuant to said notification, and shall file with the proper public agencies such required certificates or forms as are applicable to the risk.

2452. When premium payment has been received and the designated insurer has actually issued a policy, such insurer shall immediately notify the Manager that it has actually issued a policy, and shall furnish the Manager with the policy number, effective date of such policy, and the amount of premium collected.

2453. If, at the end of such fifteen day period or further reasonable period specified by the insurer in its notification pursuant to paragraph (a) of Section 2450, the premium has not been paid and the coverage therefor not accepted by the applicant, the designated insurer shall so notify the Manager.

[fol. 40]

Rates and Premiums

2460. Each risk assigned under this Plan shall be subject to the rules, rates, minimum premiums, rating plans and classifications which the insurer to which such assignment is made normally applies in this State to risks not subject to the Plan, but such insurer may make a uniform additional charge of 10% for long haul trucking risks and of 15% for all other risks.

2461. If the experience, physical or other condition of any risk assigned under the Plan is such as makes the hazard of the risk greater than that contemplated by the rates or minimum premiums applicable under Section 2460, the insurer to which the assignment is made may charge such rates and minimum premiums as are commensurate with the greater hazards of the risk, subject to the approval of the Committee. Any special increase in rate or minimum premium in accordance with this Section shall be deemed to include the additional charge of 10% for long haul trucking risks and of 15% for all other risks permitted by Section 2460.

Commissions

2462. Unless other special arrangements have been filed with and approved by the Committee, the designated insurer to which an assignment has been made shall pay the producer of record as a commission for his services in accordance with the following limits:

(a) On assignments of long haul trucking risks, 5% [fol. 41] of the total premium charged and collected from the applicant.

(b) On all other assignments, 10% of the total premium charged and collected from the applicant.

2463. In addition to the commission to the producer of record, and unless other special arrangements have been filed with and approved by the Committee, such designated insurer may pay to its licensed agent 2½% of the total premium charged and collected from the applicant as an allowance for field supervision to be actually performed by such agent.

Cancellations

2470. If after the issuance of a policy it develops that the applicant is not or ceases to be in good faith entitled, under the Plan, to insurance or has failed to comply with reasonable safety recommendations in accordance with his application agreement, or has violated any of the terms or conditions upon the basis of which the insurance was issued, or if the insurance was obtained through fraud or misrepresentation, the insuring insurer shall have the right to cancel the policy in accordance with its terms and conditions, provided that the prior written approval of the Manager to such cancellation has been obtained. In all such cases the insurer shall have filed with the Manager, in writing, prior to the effective date of cancellation, a statement of the reasons underlying such cancellation.

2471. If default occurs in the payment of premium upon [fol. 42] any policy written on a basis requiring final adjustment of the premium after expiration, such policy automatically shall be subject to cancellation in accordance with its terms and conditions.

2472. A copy of each cancellation notice pursuant to the policy terms and conditions shall be sent by the insurer to the Manager and the producer of record.

Expirations and Renewals

2480. An insured under an assigned risk who is dissatisfied with the designated insurer and a designated insurer which is dissatisfied with an assigned risk insured by it, may file with the Committee, not less than 30 days prior to the expiration of the policy, written request for assignment of such risk upon expiration to another insurer. Assignment to another insurer shall be at the option of the Committee.

2481. If any insurer other than the one designated under the Plan wishes to insure an assigned risk voluntarily at the rates and classifications normally applicable to risks not subject to the Plan, such insurer may take over the coverage at expiration, or, under the same conditions, may take over the coverage at any time with the consent of the designated insurer.

2482. Every insurer insuring a risk which has been insured for a period not exceeding 24 months by assignment under the Plan shall, upon expiration of the current policy;

(a) Issue a renewal policy voluntarily and not as an assignment under the Plan at the rates and classifications normally applicable to risks not subject to the Plan; or

(b) Issue a renewal policy as an assignment under the Plan, or

(c) Refuse to issue a renewal policy as an assignment under the Plan on the basis that the insured is not in good faith entitled, under the Plan, to insurance but for no other reason.

2482.1. At least forty-five days prior to the date of such expiration, every such insurer shall notify the Manager and the insured or the producer of record, of its intended procedure under Section 2482. If such notice discloses an intent to refuse to issue a renewal policy as an assignment under the Plan on the basis that the insured is not in good faith entitled to insurance, the insurer shall therewith furnish the Manager with a statement of the full facts underlying such basis for its intention to so refuse to renew.

2482.3. Within five days after receipt of a notification of intention to refuse to issue such a renewal policy, the Manager shall review all of the facts and circumstances surrounding the risk and make a finding whether or not the applicant is in good faith entitled, under the Plan, to insurance and shall communicate such finding to the insurer and the insured or the producer of record.

2482.5. If the Manager finds that the insured is in good faith entitled, under the Plan, to insurance and so notifies [fol. 44] the insurer pursuant to Section 2482.3, upon expiration of the current policy the insurer shall issue a renewal policy as an assignment under the Plan.

2483. The record for the current and two preceding policy years of every risk which is in its third year as an assigned risk under the Plan, except those risks which involve continuing physical impairment, shall be reviewed by the insuring insurer 45 days prior to the expiration of the current policy.

2483.1. Upon expiration of the current policy, every such risk described in Section 2483 shall be considered normal business unless during the period reviewed:

(a) The insured or anyone who normally and usually drives the automobile has been convicted of any one of the offenses described in Sections 2431 and 2431.1.

(b) The insured or anyone who normally and usually drives the automobile has been convicted of a felony.

(c) Any automobile owned by the named insured or any replacement or substitution thereof or any other automobile the operation of which is covered by the policy has been involved in

(1) one accident resulting in bodily injury to any person other than the operator or one accident resulting in both bodily injury and property damage, or

(2) two or more accidents resulting in property [fol. 45] damage.

2483.15. For the purpose of Section 2483.1, an accident shall mean an occurrence in consequence of which

(a) an amount exceeding \$200 has been paid as a loss by or on behalf of the insured or by the insurer insuring such automobile; or

(b) an amount exceeding \$200 is necessarily held as a reserve by an insurer for any pending claim for bodily injury or property damage, or both; or

(c) civil suit for damages exceeding \$200 is pending in court against the owner of such automobile.

2483.2. Each assigned risk which qualifies as normal business in accordance with Section 2483.1 shall not be eligible for further assignment under the Plan unless the producer of record is unable to place the risk with an insurer on a voluntary basis and the applicant continues to be in good faith entitled, under the Plan, to insurance. In the latter event, a renewal policy shall be issued by the insuring insurer for one year at the rates and classifications normally applicable to risks not subject to the Plan and the insurer, if it notifies the Manager, shall be credited with an assignment under the Plan. Thereafter, if such risk cannot be placed with an insurer on a voluntary basis and continues to be in good faith entitled, under the Plan, to

insurance, it shall be reassigned by the Manager as if it were a new risk, in accordance with the procedure for assignment of risks of new applicants.

2484. After 36 months of coverage as an assigned risk under the Plan, each risk which by its record in respect to the matters set forth in Section 2483.1 has demonstrated that it is not a normal risk, and each risk which involves a continuing physical impairment shall be reassigned by the Manager as if it were a new risk, in accordance with the procedure for assignment of risks of new applicants.

2485. Risks reassigned by the Manager pursuant to Sections 2483.2 and 2484 shall be considered as new Risks from the date of such reassignment in the application of the provisions of the Plan.

Finances and Assessments

2490. The reasonable costs of administering the Plan for each fiscal year shall be determined annually by the Committee and shall be apportioned and assessed to the insurers in such proportion as their net direct automobile bodily injury premium writings in the State bear to the total net direct automobile bodily injury premium writings of all insurers in the State during the preceding calendar year. Each insurer shall in any event pay a minimum annual fee of \$5.00.

2491. Each insurer shall promptly pay every assessment levied upon it by the Committee pursuant to the provisions of this Plan.

[fol. 47] Records, Statistics and Reports

2492. The Manager shall keep complete and adequate records and statistics of the applications filed, assignments made, policies issued, rejections sustained and cancellations under the Plan and of the experience of the insurers under such policies on the basis of premiums earned and losses incurred showing separately the experience of risks rated under Section 2460 and risks rated under Section 2461.

2492.1 The Manager shall prepare a report, by insurers, of the assignments made, policies issued, rejections sustained, and cancellations under the Plan for the period ending June 30, 1948, and for each six months' period thereafter. Each such report shall be made to the Committee

and a copy thereof shall be sent by the Manager to the Commissioner and to all insurers within 60 days after the close of the period covered thereby.

2492.3 The Manager shall prepare a report, by insurers, of the premiums earned and losses incurred under policies issued pursuant to assignment under the Plan, showing separately the experience of risks rated under Section 2460 and the experience of risks rated under Section 2461, for the period ending December 31, 1948, and for each 12 months' period thereafter. Each such report shall be made to the Committee and a copy thereof shall be sent to the Commissioner and to all insurers within 120 days after the close of the period covered thereby.

[fol. 48] 2492.5. The Manager shall keep such other records and statistics and make such other reports as the Committee may require.

2493. Every insurer shall keep records and statistics of its experience under all policies issued by it pursuant to assignment under this Plan in such a manner as to enable it to report such experience in the form required by the Committee, and shall make such reports of such experience as the Committee may require.

2494. The Committee shall keep a record of all funds received, disbursed and held by it and shall prepare and submit to the Commissioner and to all insurers a true and correct statement of all receipts and disbursements for the period ending June 30, 1948, and for each six-months' period thereafter. Each such statement shall be so submitted by the Committee within 60 days of the close of the period covered thereby.

2494.5. The Committee shall keep such other records and statistics and shall make such other reports as the Commissioner may require.

Appeals

2495. Any applicant, insured or insurer under the Plan who is affected by any act, ruling, decision or order of an insurer, the Manager or the Committee, and believes such act, ruling, decision or order to be in conflict with or not authorized by the provisions of the Plan or by the law, may [fol. 49] appeal in writing in the first instance to the Committee, setting forth his grounds for such belief. If any

member of the Committee is an officer, employee or other representative of an insurer which is a party to the matter, the other members of the Committee shall designate another person representative of the same group or class of insurer represented by such Committee member to replace him for the purpose of hearing the appeal. The Committee shall review all evidence and consider all statements, arguments, and contentions at a hearing upon not less than five days' notice to the parties to the matter, and within five days thereafter shall notify such parties of its decision which shall be binding upon all parties, subject to appeal to the Commissioner.

If any party to a matter which has been so appealed to the Committee is dissatisfied with the decision of the Committee upon such appeal, he may appeal to the Commissioner who shall hear the parties, review the matter and render a decision which shall be binding upon all parties.

Examinations

2496. Whenever he deems it necessary the Commissioner may examine the business, affairs and operations of the Plan. The costs and expenses of such examinations by the Commissioner shall be paid as prescribed in Section 736 of the Insurance Code and shall be a proper charge against the funds of the Plan as an expense and cost of administering the Plan.

[fol. 50]

Forms and Supplies

2497. Printed copies of the Plan and the application form shall be available at cost upon requisition to the Manager. Every insurer shall order its required supply and furnish its branch offices and policy writing agencies with an adequate stock of the forms. Application forms shall be available to any applicant or producer of record upon request so as to minimize delay in granting of coverage through assignment under the Plan to qualified applicants.

Subscription

2498. Every insurer admitted to transact liability insurance shall subscribe to this Plan. Such subscription shall be filed with the Commissioner not later than the effective date of this Plan or upon application for admission to

transact liability insurance and shall be in the following form:

Whereas, the Insurance Commissioner of the State of California, after public hearing upon published notice, has approved and issued, pursuant to Article 4, Chapter 1, Part 3, Division 2 of the California Insurance Code, a plan for the equitable apportionment, among insurers admitted to transact liability insurance in the State of California, of those applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary [fol. 51] methods, which plan has been designated as the "California Automobile Assigned Risk Plan" and is by reference incorporated herein and made a part hereof, and

Whereas, the undersigned is an insurer which either is presently admitted to transact liability insurance in the State of California or has applied for Certificate of Authority or renewal Certificate of Authority to transact liability insurance in the State of California and is required by the provisions of Section 11620 of said Code to subscribe to and participate in such Plan.

Therefore, pursuant to the provisions of said Section 11620 of the California Insurance Code, and in consideration of its admission to transact liability insurance in the State of California, the undersigned insurer hereby subscribes to said California Automobile Assigned Risk Plan and agrees to participate therein in accordance with the terms thereof.

This subscription and agreement shall be deemed to have been executed in the State of California and the interpretation and enforcement thereof shall be governed by the laws of that State.

[fol. 52] In Witness Whereof, — —, (Name of Insurer), has to these presents affixed its seal and caused its name to be subscribed and attested by its — —, (Title of Officer), and — —, (Title of Officer), on the — day of — 194—.

— —, (Name of Insurer); By — —, (Name of Officer). (Seal.)

Attest: — —, (Name of Officer); — —, (Name of Officer).

[fol. 53] [File endorsement omitted]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

ORDER TO SHOW CAUSE—Filed March 22, 1948

Upon reading the verified petition for writ of mandate heretofore filed in the above entitled proceeding,

It is hereby ordered that Wallace K. Downey, Insurance Commissioner of the State of California, the respondent herein, be and appear before this Court on Monday, the 5th day of April, 1948, at the hour of 2:00 P.M. of that day at the Courtroom of Department No. 2, of the above named Court in the City Hall at San Francisco, California, then and there to show cause, if any he has, why the prayer of the petitioner herein should not be granted and the order of said respondent dated March 19, 1948, copy of which is attached to the petition herein, should not be vacated and set aside, and the right of the petitioner herein to transact liability insurance should not be restored as the holder of a certificate of authority issued by respondent to transact said business for the year July 1, 1947 to July 1, 1948.

And good cause appearing therefor, it is hereby further ordered that the operation of the said decision of the respondent dated March 19, 1948 be and the same is hereby stayed and nullified pending the judgment of this Court therein.

[fol. 54] And good cause appearing therefor, it is further ordered that respondent file in this Court the complete record of the proceedings as the result of which the said decision of the respondent was made.

Dated: March 22, 1948.

(s) Herbert C. Kaufman, Judge of the Superior Court.

[fol. 55] [File endorsement omitted]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

RESPONDENT'S RETURN—Filed April 26, 1948

Now comes Wallace K. Downey, as Insurance Commissioner of the State of California, and herewith makes his return on the order to show cause in the above proceedings.

And for First Part of Said Return

Said respondent demurs to the petition for writ of mandate herein and for grounds or demurrer specifies:

I

That said petition does not state facts sufficient to constitute a cause of action.

II

That said petition is uncertain in that paragraph 16 thereof does not designate or specify the evidence alleged by petitioner to have been improperly excluded.

III

That said petition is ambiguous in the same respect that it is uncertain.

IV

That said petition is unintelligible in the same respect as it is ambiguous.

And by way of answer, as the second part of said return, respondent admits, denies and alleges as follows:

[fol. 56]

I

Admits the allegations of paragraph 1 of said petition.

II

Admits the allegations of paragraph 2 of said petition.

III

In respect to the allegations of paragraph 3 of said petition respondent is without information or belief as to the number of members of the California State Automobile Association and as to how many of those members are citizens of the State of California, and for lack of such information and belief denies that said Association has a membership of over one hundred thousand citizens or that it has any substantial membership. Except with respect to said membership, respondent admits the allegations of paragraph 3 of said petition.

IV

In respect to the allegations of paragraph 4 of said petition, respondent is without information or belief as to the purpose of the organization of petitioner or as to the purpose of its subsequent existence, and for lack of such information or belief denies that petitioner was formed and organized in the year 1941 solely for the purpose of making insurance available to members of the California State Automobile Association, or that it was formed for the purpose of making insurance available to said members, and likewise denies that it was formed and organized in the year 1914 solely for the purpose of making insurance [fol. 57] available to members of California State Automobile Association, or that it at all times thereafter existed solely for that purpose.

Respondent further denies that a rule that only members in good standing of the California State Automobile Association or corporations or firms in which such members are officers or partners shall be eligible to apply for insurance in said petitioner is its basic underwriting policy or is an underwriting policy at all, and denies that petitioner has adhered to such a rule.

V

In respect to the allegations of paragraph 5 of said petition respondent denies that said decision of the respondent is invalid, denies that such decision is void, and denies that it is invalid and void; with this exception respondent admits the allegations of said paragraph 5 of said petition.

VI

Admits the allegations of paragraph 6 of said petition.

VII

With respect to the allegations of paragraph 7 of said petition, respondent admits that the assigned risk plan therein referred to requires insurers to subscribe thereto and to observe and adhere to the terms thereof; with this exception denies each and every, all and singular, the allegations of said paragraph 7.

[fol. 58]

VIII

With respect to the allegations of paragraph 8 of said petition respondent admits that the assigned risk plan therein referred to requires insurers to subscribe thereto and to observe and adhere to the terms thereof; with this exception denies each and every, all and singular, the allegations of said paragraph 8.

IX

Denies each and every, all and singular, the allegations of paragraph 9 of said petition.

X

Denies each and every, all and singular, the allegations of paragraph 10 of said petition.

XI

Admits the allegations of paragraph 11 of said petition.

XII

Denies each and every, all and singular, the allegations of paragraph 12 of said petition.

XIII

Admits the allegations of paragraph 13 of said petition and alleges that a certified copy of said proceedings has by respondent been filed with this Court.

XIV

Denies each and every, all and singular, the allegations of paragraph 14 of said petition.

[fol. 59]

XV

Denies each and every, all and singular, the allegations of paragraph 15 of said petition.

XVI

Denies each and every, all and singular, the allegations of paragraph 16 of said petition.

XVII

Respondent alleges that petitioner alone has refused to subscribe to said assigned risk plan and that all other insurers transacting the class "liability insurance" in the State of California have subscribed to said plan; that attached hereto, marked Exhibit "B" and made a part hereof is an affidavit on behalf of respondent to that effect.

Wherefore, respondent prays that this Court deny petitioner any relief in this proceeding and that respondent be dismissed hence with its costs.

Dated: April 26, 1948.

(s) Fred N. Howser, Attorney General of the State of California; T. A. Westphal, Jr., Deputy Attorney General; Harold B. Haas, Deputy Attorney General, Attorneys for Respondent.

[fol. 60]

EXHIBIT "B" TO RETURN

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND
FOR THE CITY AND COUNTY OF SAN FRANCISCO

Affidavit No. 374555

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE
BUREAU, Petitioner,

vs.

WALLACE K. DOWNEY, Insurance Commissioner of the State
of California, Respondent

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

Talt E. Stealey, being first duly sworn, deposes and says as follows, to wit:

1. That he is a Deputy Insurance Commissioner of the Department of Insurance, State of California, and is employed at the office of the Insurance Commissioner, State of California, at San Francisco, California;

2. That said Department keeps a record of each insurer admitted to transact liability insurance in the State of Cali-

for California, and a record of whether or not each such liability insurer has subscribed to the California Automobile Assigned Risk Plan;

3. That Affiant has examined such record of said Department of Insurance, and said record discloses the following:

(a) That there are 137 insurers admitted to transact liability insurance in the State of California;

[fol. 61] (b) That of said number of insurers admitted to transact liability insurance in the State of California, 136 have subscribed to the California Automobile Assigned Risk Plan;

(c) That the only insurer admitted to transact liability insurance in the State of California which has not subscribed to the California Automobile Assigned Risk Plan is the California State Automobile Association Inter-Insurance Bureau;

(d) That the companies admitted to transact liability insurance in the State of California who have subscribed to the California Automobile Assigned Risk Plan are:

Accident & Casualty Insurance Company of Winterthur, Switzerland.

Aetna Casualty and Surety Company.

Allied Compensation Insurance Company.

Allstate Insurance Company.

American Automobile Insurance Company.

American Bonding Company of Baltimore.

American Casualty Company of Reading, Pennsylvania.

American Credit Indemnity Company of New York.

American Eagle Fire Insurance Company.

American Employers' Insurance Company.

American Fidelity & Casualty Company, Inc.

American Guarantee & Liability Insurance Company.

American Indemnity Company.

American Motorists Insurance Company.

[fol. 62] American Mutual Liability Insurance Company.

American Reinsurance Company.

American States Insurance Company.

American Surety Company of New York.

Anchor Casualty Company.

Arex Indemnity Company.

Associated Indemnity Corporation.

Atlantic Insurance Company.

Bankers Indemnity Insurance Company.
 California Casualty Indemnity Exchange.
 California Compensation Insurance Company.
 Canadian Indemnity Company.
 Car & General Insurance Corporation, Ltd.
 Casualty Indemnity Exchange.
 Casualty Reciprocal Exchange (Subscribers at).
 Celina Mutual Casualty Company.
 Central Surety and Insurance Corporation.
 Colonial Insurance Company.
 Columbia Casualty Company.
 Commercial Casualty Insurance Company.
 Commercial Standard Insurance Company.
 Connecticut Indemnity Company.
 Consolidated Underwriters.
 Continental Casualty Company.
 Continental Insurance Company.
 Century Indemnity Company.
 [fol. 63] Eagle Indemnity Company.
 Employers Casualty Company.
 Employers' Liability Assurance Corporation, Ltd.
 Employers Mutual Liability Insurance Co. of Wisconsin.
 Employers Reinsurance Corporation.
 European General Reinsurance Company, Ltd.
 Excess Insurance Company of America.
 Factory Mutual Liability Insurance Co. of America.
 Farmers Insurance Exchange.
 Fidelity & Casualty Company of New York.
 Fidelity & Deposit Company of Maryland.
 Fidelity, Phoenix Fire Insurance Company.
 Fireman's Fund Indemnity Company.
 Fireman's Fund Insurance Company.
 Founders Fire & Marine Insurance Company.
 General Accident Fire and Life Assurance Corporation,
 Ltd.
 General Casualty Company of America.
 General Insurance Corporation.
 General Reinsurance Corporation.
 Glens Falls Indemnity Company.
 Globe Indemnity Company.
 Great American Indemnity Company.
 Guarantee Insurance Company.
 Gulf Insurance Company.
 Harbor Insurance Company.

- Hardware Indemnity Insurance Company of Minnesota.
 [fol. 64] Hardware Mutual Casualty Company.
 Hartford Accident & Indemnity Company.
 Hartford Fire Insurance Company.
 Home Fire & Marine Insurance Company of California.
 Home Indemnity Company.
 Indemnity Insurance Company of North America.
 Industrial Indemnity Company.
 Industrial Indemnity Exchange.
 Liberty Mutual Insurance Company.
 London Guarantee and Accident Company Ltd.
 London & Lancashire Indemnity Company of America.
 Lumbermen's Mutual Casualty Company.
 Manufacturers' Casualty Insurance Company.
 Manufacturers & Merchants Indemnity Company.
 Manufacturers & Wholesalers Indemnity Exchange.
 Maryland Casualty Company.
 Massachusetts Bonding & Insurance Company.
 Medical Protective Company.
 Metropolitan Casualty Insurance Co. of New York.
 Mid-States Insurance Company.
 Mutual Implement & Hardware Insurance Company.
 National Automobile & Casualty Insurance Company.
 National Casualty Company.
 National Surety Corporation.
 New Amsterdam Casualty Company.
 New York Casualty Company.
 [fol. 65] Niagara Fire Insurance Company.
 Northwest Casualty Company.
 Northwestern Insurance Company.
 Northwestern National Casualty Co.
 Norwich Union Indemnity Company.
 Ocean Accident & Guarantee Corporation.
 Ohio Casualty Insurance Company.
 Ohio Farmers Indemnity Company.
 Pacific Automobile Insurance Company.
 Pacific Employers Insurance Company.
 Pacific Indemnity Company.
 Peerless Casualty Company.
 Phoenix Indemnity Company.
 Pioneer Equitable Insurance Company of Indiana.
 Preferred Accident Insurance Company of New York.
 Republic Indemnity Company of America.

Royal Indemnity Company.
 Saint Paul Mercuty Indemnity Company.
 Seaboard Surety Company.
 Security Mutual Casualty Company.
 Service Casualty Company of New York.
 Standard Accident Insurance Company.
 State Farm Mutual Automobile Insurance Company.
 Sun Indemnity Company of New York.
 Superior Insurance Company.
 Traders & General Insurance Company.
 [fol. 66] Transit Casualty Company.
 Transport Insurance Exchange.
 Travelers Insurance Company.
 Travelers Indemnity Company.
 Trinity Universal Insurance Company.
 Truck Insurance Exchange.
 United National Indemnity Company.
 United Pacific Insurance Company.
 United States Casualty Company.
 United States Fidelity & Guaranty Company.
 United States Guarantee Company.
 Utica Mutual Insurance Company.
 West American Insurance Company.
 Western Casualty and Surety Company.
 Western National Indemnity Company.
 Western National Insurance Company.
 Yorkshire Indemnity Company of New York.
 Zurich General Accident & Liability Insurance Co., Ltd.
 (S.) Talt E. Stealey, Affiant.

Subscribed and sworn to before me this 26th day of
 April, 1948. Irene V. Boost, Deputy Insurance
 Commissioner.

[fol. 67] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

CLERK'S MINUTE ENTRY

ORDER FOR JUDGMENT—September 13, 1948

Upon a careful reading of the entire record and briefs in this cause, and consideration of counsel's contentions, I have found that petitioner was given a fair trial, respondent proceeded within his jurisdiction in the manner required by law, respondent's order is supported by the findings and the findings are supported by the evidence. I have also found that respondent's order was properly issued within the scope of the authority given him by the statute under which he acted, and that the statute is a valid and proper exercise of legislative power.

Therefore, the writ of mandate applied for is denied and judgment is ordered for respondent. Pursuant to the provisions of Subdivision (f) of Section 1094.5, Code of Civil Procedure, the stay of the respondent's order shall terminate upon notice of entry of the judgment.

Counsel for respondent is directed to prepare findings of fact and conclusions of law.

[fol. 68]

[File endorsement omitted]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

FINDINGS OF FACT AND CONCLUSIONS OF LAW—September 29, 1948

The above entitled proceeding came on regularly for hearing on June 30, 1948, in Department 2 of the above entitled Court before the Honorable Edward P. Murphy, Judge Presiding, without a jury. Petitioner was represented by Brobeck, Phleger and Harrison, by Moses Lasky, Esq., and the respondent was represented by Fred N. Howser, Attorney General of the State of California, by T. A. Westphal, Jr., and Harold B. Haas, Deputies Attorney General. The record of the proceedings before the Insurance Commissioner having been filed it was agreed by counsel that the same was before the Court. Certain addi-

tional evidence was offered and some received, and arguments of counsel were heard, briefs by counsel having theretofore been submitted pursuant to permission of the Court.

The Court has read and considered the entire record of the proceedings before respondent, and has duly considered the pleadings and argument of the parties in the case. Upon the basis of such reading and consideration it now makes and files its findings of fact and conclusions of law as follows:

I

That, with respect to a certain written "Decision" of the Insurance Commissioner, adopting a "Proposed Decision" of a Hearing Officer, which said "Decision" bears date of March 19, 1948, a true copy of both "Decision" and "Proposed Decision" being set forth as "Exhibit 1" to the Petition for Writ of Mandate in this case are therefore not here set forth at length, said "Decision" was duly and regularly issued, the order thereby adopted was supported by findings which, in turn, were supported by the weight of the relevant and material evidence, said order was within the legal discretion and jurisdiction of the respondent and was a valid and reasonable exercise of that discretion and jurisdiction, the proceeding in which such evidence was taken was duly and regularly had and taken, and petitioner was given a fair trial therein.

II

That the allegations set forth in paragraphs 1, 2 and 3 of the Petition for Writ of Mandate herein are true.

III

That petitioner was formed and organized in the year 1914, solely for the purpose of making insurance available to, and has in practice limited its insurance coverage to "Members of the California State Automobile Association or corporations or firms in which such members are officers or partners," and has at all times thereafter existed solely for that purpose, and it has continued this practice in force, but there is no evidence to show that said association applied or enforced any particular standard affecting insurability in procuring or accepting such members. From its inception [fol. 70] it has at all times been and it is petitioner's

basic policy that only members in good standing of the California State Automobile Association or corporations or firms in which such members are officers or partners shall be eligible to apply for insurance in petitioner.

IV

That on March 19, 1948, the respondent herein, Wallace K. Downey, as Insurance Commissioner of the State of California, issued a certain "Decision" ordering that the certificate of authority of the California State Automobile Association Inter-Insurance Bureau to transact liability insurance be suspended. That "Decision" is not set forth in full here because it is admitted by respondent that the copy thereof set forth as "Exhibit 1" to the petition for Writ of Mandate herein is a correct copy. That it is untrue that said "Decision" is invalid and void; but that it is true that said "Decision" is valid and lawful; that the "Decision" and every part thereof is within the proper and lawful discretion of respondent; that in the proceedings which led to said "Decision" respondent proceeded within his proper and lawful discretion in the manner required by law and gave petitioner a fair trial; and that the order which is a part thereof is supported by the findings and the findings are supported by the evidence.

V

That the "Decision" was issued by reason of failure of [fol. 71] petitioner to subscribe to a certain "California Automobile Assigned Risk Plan," which plan was issued pursuant to the provisions of Article 4, Chapter I, Part 3, Division 2 of the Insurance Code of the State of California; that said plan was a part of the record and is set forth as Article 8 of Title 10, California Administrative Code, being sections 2400 to 2498, inclusive, thereof and is captioned, "California Automobile Assigned Risk Plan." Pursuant to the provisions of section 11384 of the Government Code, the Court also takes judicial notice of the provisions of said plan.

VI

That petitioner and all other insurers authorized to transact liability insurance in California are required by the statute and under the plan to subscribe to and to observe

and adhere to the terms of the California Automobile Assigned Risk Plan, but that neither the plan nor any part thereof, nor the "Decision" of the Insurance Commissioner above referred to, are unconstitutional or void; that neither sections 11620 to 11627, inclusive, Insurance Code, nor any portion of said sections, are unconstitutional or void; that the "Decision" and order of the respondent were properly issued pursuant to said statute, plan and other laws regulating such action by said respondent.

VII

That the practice by petitioner of limiting its insurance coverage, set forth in Finding of Fact Number III, above, is [fol. 72] not an "underwriting policy" within the meaning of that term as used in section 11621, Insurance Code; but that if such practice be regarded as such an underwriting policy the California Automobile Assigned Risk Plan does not violate that section of the Insurance Code, either by reason of the provisions of sections 2445.1, 2445.15, or by reason of any other portion of that plan; that neither said plan, nor any portion thereof, violates any provision of either the Constitution of the State of California or the Constitution of the United States.

VIII

The Court makes no finding on the allegations of paragraph 12 of the petition for writ of mandate and finds that the allegations of paragraph 13 thereof are true.

IX

That, except as otherwise set forth in these Findings of Fact, the allegations of the Petition for Writ of Mandate herein are untrue.

Conclusions of Law

As conclusions of law from the foregoing findings of fact, the Court finds and legally concludes:

I

That respondent Insurance Commissioner had jurisdiction to begin, carry on, and conclude the proceedings upon which his "Decision" was based, and that he had jurisdic-

tion to issue that "Decision," sought to be annulled herein; [fol. 73] that said proceedings and "Decision" were within the scope of his lawful discretion, and that he duly, regularly, and properly exercised said discretion in carrying on said proceedings and making said "Decision," and each of the findings set forth in said "Decision" is supported by the evidence.

II

That said decision is in no manner invalidated by reason of any provision of sections 11620 to 11627, inclusive, Insurance Code, or by reason of any provision of the "California Automobile Assigned Risk Plan"; that said plan was issued pursuant to and in conformity with said statute, and that neither said statute nor said plan is invalid by reason of conflict with any provision of the Constitution of the State of California or of the United States.

III

That respondent is entitled to the issuance of judgment denying the Writ of Mandate applied for by petitioner and dissolving the stay of respondent's "Decision" and order heretofore issued by this Court, and dismissing respondent hence with its costs.

Let Judgment issue accordingly.

Dated: September 29, 1948

(S.) Edward P. Murphy, Judge of the Superior Court.

Receipt of copy of within Findings of Fact and Conclusions of law admitted this 29th day of September, 1948, and form approved as being in accord with Court's rulings on settlement.

(S.) Brobeck, Phleger and Harrison, Moses Lasky.

[fol. 74] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

CLERK'S MINUTE ENTRY RE FINDINGS—September 29, 1948

In this action, with respective counsel present, the Court ordered findings settled as amended and off calendar.

[fol. 75] [File endorsement omitted]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

JUDGMENT—September 29, 1948

The above proceeding came on regularly for hearing on June 30, 1948 in Department 2 of the above entitled court, before the Honorable Edward P. Murphy, Judge Presiding, without a jury. Petitioner was represented by Brobeck, Phleger and Harrison, by Moses Lasky, Esq., and the respondent was represented by Fred N. Howser, Attorney General of the State of California, by T. A. Westphal, Jr., and Harold B. Haas, Deputies Attorney General.

The record of the proceedings before the Insurance Commissioner having been filed, it was agreed by counsel that the same was before the Court. Certain additional evidence was offered and some received, and arguments of counsel were heard, briefs by counsel having theretofore been submitted pursuant to permission of the Court.

The Court having duly considered the matter and having filed its findings of fact and conclusions of law constituting the decision of the Court,

Now, therefore, it is hereby ordered, adjudged and decreed:

I

That the Petition for Writ of Mandate in this cause be and hereby is denied.

[fol. 76]

II

That pursuant to the provisions of subdivision (f) of section 1094.5, Code of Civil Procedure, the stay of the decision of the Commissioner heretofore issued as part of the Order to Show Cause in this proceeding be and hereby is dissolved

tion to issue that "Decision," sought to be annulled herein; [fol. 73] that said proceedings and "Decision" were within the scope of his lawful discretion, and that he duly, regularly, and properly exercised said discretion in carrying on said proceedings and making said "Decision" and each of the findings set forth in said "Decision" is supported by the evidence.

II

That said decision is in no manner invalidated by reason of any provision of sections 11620 to 11627, inclusive, Insurance Code, or by reason of any provision of the "California Automobile Assigned Risk Plan"; that said plan was issued pursuant to and in conformity with said statute, and that neither said statute nor said plan is invalid by reason of conflict with any provision of the Constitution of the State of California or of the United States.

III

That respondent is entitled to the issuance of judgment denying the Writ of Mandate applied for by petitioner and dissolving the stay of respondent's "Decision" and order heretofore issued by this Court, and dismissing respondent hence with its costs.

Let Judgment issue accordingly.

Dated: September 29, 1948

(S.) Edward P. Murphy, Judge of the Superior Court.

Receipt of copy of within Findings of Fact and Conclusions of law admitted this 29th day of September, 1948, and form approved as being in accord with Court's rulings on settlement.

(S.) Brobeck, Phleger and Harrison, Moses Lasky.

[fol. 74] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN
FRANCISCO

CLERK'S MINUTE ENTRY RE FINDINGS—September 29, 1948

In this action, with respective counsel present, the Court ordered findings settled as amended and off calendar.

[fol. 75] [File endorsement omitted]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

JUDGMENT—September 29, 1948

The above proceeding came on regularly for hearing on June 30, 1948 in Department 2 of the above entitled court, before the Honorable Edward P. Murphy, Judge Presiding, without a jury. Petitioner was represented by Brobeck, Phleger and Harrison, by Moses Lasky, Esq., and the respondent was represented by Fred N. Howser, Attorney General of the State of California, by T. A. Westphal, Jr., and Harold B. Haas, Deputies Attorney General.

The record of the proceedings before the Insurance Commissioner having been filed, it was agreed by counsel that the same was before the Court. Certain additional evidence was offered and some received, and arguments of counsel were heard, briefs by counsel having theretofore been submitted pursuant to permission of the Court.

The Court having duly considered the matter and having filed its findings of fact and conclusions of law constituting the decision of the Court,

Now, therefore, it is hereby ordered, adjudged and decreed:

I

That the Petition for Writ of Mandate in this cause be and hereby is denied.

[fol. 76]

II

That pursuant to the provisions of subdivision (f) of section 1094.5, Code of Civil Procedure, the stay of the decision of the Commissioner heretofore issued as part of the Order to Show Cause in this proceeding be and hereby is dissolved

rated in the record on appeal and hereby requests that said Clerk prepare a Clerk's transcript and include therein:

1. The Judgment Roll.
2. Unless otherwise included in the record as part of the Judgment Roll, the Petition for Writ of Mandate and the Respondent's Return (not including "Memorandum of Points and Authorities on Respondent's Return to the Order to Show Cause").
- [fol. 80] 3. Order to show cause issued March 22, 1948.
4. Record of Proceedings before the Insurance Commissioner filed herein by respondent.
5. The Clerk's minutes, including minute order entered on or about September 13, 1948.
6. Findings of fact and conclusions of law.
7. Judgment.
8. Notice of entry of judgment.
9. Notice of appeal.
10. This notice.

The above mentioned Record of Proceedings before the Insurance Commissioner need not be copied into the Clerk's transcript if it is possible to transmit the original to the reviewing court, and it is requested that the original of said Record of Proceedings before the Insurance Commissioner shall be so transmitted in accordance with the Rules on Appeal.

Dated: November 3, 1948.

Brobeck, Phleger & Harrison, Attorneys for petitioner and appellant California State Automobile Association Inter-Insurance Bureau.

[fols. 81-84] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 85] BEFORE THE DEPARTMENT OF INSURANCE, STATE OF
CALIFORNIA

No. S. F. 5337-A

In the Matter of the Certificate of Authority to Transact
Liability Insurance of CALIFORNIA STATE AUTOMOBILE
ASSOCIATION INTER-INSURANCE BUREAU, Respondent

Reporter's Transcript of Proceedings at Hearing

Hearing Room,
Department of Insurance,
417 Montgomery Street,
San Francisco, California.
March 5, 1948.

Before: John G. Clarkson, Esq., Hearing Officer

APPEARANCES:

For the Department: Frank Fullenwider, Esq., Deputy
Insurance Commissioner.

For the Respondent: Brobeck, Phleger & Harrison, Represented by: Moses Lasky, Esq., Maurice E. Harrison, Esq.

[fols. 86-91] Morning Session—Friday, March 5, 1948

Hearing Officer: Are you ready, Mr. Fullenwider?

Mr. Fullenwider: Yes, Mr. Clarkson.

Hearing Officer: Does someone here represent the Respondent, California State Automobile Association, Inter-Insurance Bureau?

Mr. Lasky: Yes sir.

Hearing Officer: Will you let the reporter have your full name and experience?

Mr. Lasky: Representing the California State Automobile Inter-Insurance Bureau are Maurice E. Harrison and Moses Lasky.

OPENING STATEMENT OF HEARING OFFICER

Hearing Officer: This is a hearing in the Matter of the Certificate of Authority to Transact Liability Insurance of California State Automobile Association Inter-Insurance Bureau.

Before the matter proceeds I should like to read into the record the assignment or designation as my authority to appear as Hearing Officer in this Matter directed to the Insurance Commissioner of the State of California. Subject: Hearing Scheduled in San Francisco on March 5, 1948.

"In accordance with your request John G. Clarkson, Hearing Officer, Division of Administrative Procedure, is hereby assigned to act as hearing officer for the Insurance Commissioner of the State of California as [fol. 92] required by Government Code, Sections 11500 through 11528, inclusive. This assignment, made pursuant to the powers vested in me by the Business and Professions Code, Section 110.5, is for the period specified above and, for the purpose of any hearing commenced during such period, shall continue until the effective date of the decision in the matter."

It is signed by James A. Arnerich, Director, and is on the letterhead of the Department of Professional and Vocational Standards. It is dated February 26, 1948. If you gentlemen would like to examine this it is here.

Are you ready to proceed, Mr. Fullenwider? I would suggest that you mark for the record as exhibits—although you appreciate, Counsel, that these are not evidentiary but merely the pleadings in the Matter—the Accusation and other papers; Notice of Defense, if any, and so forth.

OFFERS IN EVIDENCE

Mr. Fullenwider: Very well.

I will mark the Accusation in the Matter of the Certificate of Authority to Transact Liability Insurance of the California State Automobile Association Inter-Insurance Bureau, dated February 4, 1948, and signed, Wallace K. Downey, Insurance Commissioner, by Frank Fullenwider, Deputy, as Exhibit 1-A.

Hearing Officer: 1-A.

(Thereupon the document referred to above was admitted into evidence and marked Exhibit 1-A for the Commissioner.)

[fol. 93] Mr. Fullenwider: I will next mark the Statement to Respondent, bearing the same file number and the

same title, directed to the California State Automobile Association Inter-Insurance Bureau, and bearing the same date, February 4, 1948, executed by Wallace K. Downey, Insurance Commissioner, by Frank Fullenwider, Deputy, as Exhibit 1-B.

Hearing Officer: Please.

(Thereupon the document referred to above was admitted into evidence and marked Exhibit 1-B for the Commissioner.)

Mr. Fullenwider: I will next mark the form Notice of Defense in the same matter, bearing same file number, dated February 10, 1948, and executed by the California State Automobile Association Inter-Insurance Bureau, by George Chalmers, Manager, Attorney in Fact, as 1-C.

Hearing Officer: That would be right, thank you.

(Thereupon the document referred to above was admitted into evidence and marked Exhibit 1-C for the Commissioner.)

Mr. Fullenwider: And finally, the Notice of Hearing in the same matter to which there is annexed an Affidavit of Service which, with your permission, I will have attached simply as completing the file. The Notice of Hearing is dated February 24, 1948, executed by Wallace K. Downey, Insurance Commissioner, by Frank Fullenwider, Deputy, setting the Hearing in this matter for this morning at ten o'clock at this place. I offer this as 1-D.

Hearing Officer: 1-D.

[fol. 94] Mr. Fullenwider: That completes the file of preliminary exhibits, Mr. Hearing Officer.

Hearing Officer: Yes, all right, thank you. Well I have received a copy of 1-A, B, and D, but not 1-C. Does 1-C admit any of the statistical data in the Accusation?

Mr. Fullenwider: No. Exhibit 1-C is a form Notice of Defense.

Hearing Officer: No special defense?

Mr. Fullenwider: No special defense filed.

Hearing Officer: All right. You may proceed.

Mr. Fullenwider: Mr. Lasky, may it be stipulated that the facts alleged in Paragraph I of the Accusation, marked Exhibit 1-A, are true?

Mr. Lasky: Yes.

Mr. Fullenwider: Now, Mr. Lasky, in connection with Paragraph II of the Accusation, may it be stipulated that the Insurance Commissioner on the 8th day of December, 1947, approved and issued a Plan for the apportionment among insurers admitted to transact liability insurance of applicants for automobile bodily injury and property damage insurance?

Mr. Lasky: Yes.

Mr. Fullenwider: And in connection with that same Paragraph may it be further stipulated that that Plan is contained in the Administrative Register, Register 7, and comprises Sections 2400 to 2498 of Title 10 of the California Administrative D Code, and that those Sections as contained [fol. 95] in the official State publication, being contained on pages 226.15 to 226.31, may be entered into evidence?

Mr. Lasky: You refer to Title 10, Register VII, of the California Administrative Code?

Mr. Fullenwider: Yes. There is an overlap of one previous Section in the Administrative Code on the page which may not be considered as a part of this Exhibit.

Mr. Lasky: You are referring here to Article 8. So stipulated.

Mr. Fullenwider: Pursuant to stipulation, offering the pages of the California Administrative Code identified in the stipulation, as Exhibit Number 2.

Hearing Officer: And excluding that portion you have indicated.

Mr. Fullenwider: Excluding that portion which appears at the top of the first page and is labeled, Section 2253.

Hearing Officer: To be received and marked Exhibit 2 of the Department.

(Thereupon the document referred to above was admitted into evidence and marked Exhibit 2.)

Mr. Fullenwider: Now, Mr. Lasky, in connection with Paragraph III of the Accusation and Exhibit 1-A, may it be stipulated that the Insurance Commissioner on December 16, 1947 mailed to the Respondent in this matter a copy of the Plan just introduced into evidence as Exhibit Number 2?

[fol. 96] Mr. Lasky: So stipulated.

Mr. Fullenwider: In connection with Paragraph IV of the Accusation, Exhibit 1-A, may it be stipulated that the Respondent only failed to subscribe to the said Plan intro-

duced as Exhibit Number 2, on or about January 19, 1948, or at all?

Mr. Lasky: So stipulated.

Mr. Fullenwider: In connection with Paragraph V of the Accusation may it be stipulated that the Insurance Commissioner on January 20, 1948 mailed a Notice to the Respondent at its address, 150 Van Ness Avenue, San Francisco, 2, California, to subscribe to the Plan admitted as Exhibit 2 herein; that the said Notice was received by the said Respondent on January 21, 1948; and that the Notice required Respondent to subscribe to the Plan on or before February 1, 1948?

Mr. Lasky: Yes.

Mr. Fullenwider: Now, in connection with Paragraph VI of the Accusation, may it be stipulated that the fact set forth in that Paragraph are true?

Mr. Lasky: Yes.

Mr. Fullenwider: The Department rest.

Mr. Lasky: Before the Respondent proceeds with evidence we would like to make a brief statement of our position.

Hearing Officer: All right.

Mr. Lasky: The Statute under which this Plan which [fols. 97-99] has just been placed in evidence as Exhibit 2 was issued and approved by the Insurance Commissioner is unconstitutional. In the first place it is unconstitutional because it deprives persons, and particularly this Respondent and its members, of property without due process of law; and likewise, deprives them of liberty without due process of law. And for that reason it violates the Fourteenth Amendment to the United States Constitution, and particularly, the Due Process Clause thereof. For the same reason it violates Section 13, Article I, of the Constitution of the State of California.

Secondly, as applied to the Respondent in this cause and its members, it impairs an obligation of contract, namely, the contract entered into between the members of this Association and the California State Automobile Association Inter-Insurance Bureau whereby it is agreed that only members of the California State Automobile Association shall be insured. And thereby the Statute violates Section 10, of Article I, of the United States Constitution, and Section 13 of Article I of the Constitution of California. And not only the Statute but the plan issued purportedly there-

under also violates the various constitutional provisions I have already referred to.

[fol. 100] We shall show that the California State Automobile Association Inter-Insurance Bureau was organized in the year 1914 for the purpose of providing insurance solely to the members of the California State Automobile Association; that at that time in pursuance to the statutes which pre-[fol. 101] ceded the Insurance Code, it filed its power of attorney with the Insurance Commissioner in this office and that power of attorney authorized the attorney in fact to issue policies of insurance that complied with the rules and regulations of the insurance board, this inter-insurance board, the Respondent. Among the rules and regulations of Section 1 was a provision that insurance could only be issued to members of the California State Automobile Association; and that provision, that section was the only provision in these rules and regulations restricting the type of insurance, the type of risk to whom insurance could be issued. We shall show that those rules and regulations, and that power of attorney, remained on file in this office from 1914 until 1925 and were the basis upon which the Respondent operated during that period. We shall show that in 1925 another power of attorney to which was attached the rules and regulations of the Respondent was filed in this office and that those papers contained the same fundamental, basic underwriting policy and that there were no other such restrictions or policies stated. We shall show that that remained on file in this office from 1925 until 1941 and that the Respondent has at all times operated thereunder. We shall show that in 1941 the Respondent filed in this office pursuant to law a further power of attorney with certain rules and regulations attached and that those rules and regulations contained the same restriction, the same fundamental, basic underwriting policy, and that there were no [fol. 102] others. And that those documents have remained on file at all times since that date, so that ever since the time of its creation in 1914, some thirty-four years ago, the basic, fundamental underwriting policy of the Respondent has been that it would not insure anyone who was not a member of the California State Automobile Association. We shall offer in evidence some other material matters that have a bearing upon due process.

Now, Mr. Fullenwider, do you have available, as agreed, certain documents?

Mr. Fullenwider: Yes. If you will give me a few moments recess, Mr. Hearing Officer, the certifications have just been given to me and I will staple them to the copies and hand them to Counsel.

Hearing Officer: All right. A five minute recess.

(Recess.)

Hearing Officer: We will resume the Hearing in the Matter of the Inter-Insurance Bureau.

Mr. Lasky: The Hearing is resumed?

Hearing Officer: Yes. Resume the Hearing now, please.

Mr. Lasky: I offer as Respondent's Exhibit A, certified copy of Power of Attorney and Application for Automobile Insurance of the California State Automobile Association Inter-Insurance Bureau, certified by Mr. Fullenwider, Deputy Insurance Commissioner, as being a photostatic copy of the face of the Power of Attorney and Application [fols. 103-107] for Automobile Insurance filed with the Insurance Commissioner on the 29th day of June, 1914.

[fol. 108] (Thereupon the document referred to above was admitted into evidence and marked Respondent's Exhibit A.)

Mr. Lasky: I would like to read from Exhibit A. First, before doing so, will it be stipulated you have only certified the front of Exhibit A and that the reverse side, the remainder, is the form of application and not part of the Power of Attorney?

Mr. Fullenwider: That may be so stipulated in connection with that offer and any offer.

Mr. Lasky: Which would be Exhibits B, C, D, E, and F.

Mr. Fullenwider: Proposed exhibits.

[fol. 109] Mr. Lasky: Proposed exhibits, yes.

The Power of Attorney filed in 1914 reads as follows:

"Whereas, at San Francisco, California, an office has been opened under the name of California State Automobile Association Inter-Insurance Bureau, herein called the Bureau, where certain persons, firms and corporations may exchange indemnity against the loss or damage from certain hazards arising from fire, theft, or collision, and incident to ownership, maintenance and operation of automobile used by them.

"And Whereas, P. J. Walker, Nathan Bell, and E. B. de Golia, constituting the executive committee of the Insurance Board, constituted according to the rules hereinafter referred to, hold Power of Attorney for each of the subscribers to said Bureau, with full power of substitution and revocation.

"And Whereas, (blank) herein known as the subscriber, desires to become a member of said Inter-Insurance Bureau and hereby applies for insurance against the hazards herein indicated to the extent limited and defined in the policy of insurance which shall be issued by said Bureau, for the term of one year, commencing (blank) 191 (blank) at noon and expiring (blank) 191 (blank) at noon, upon the automobile, including its body, machinery and equipment, described herein, which description is hereby declared to be true [fol. 110] and correct and made a warranty by the subscriber.

"Now, Therefore, the subscriber does hereby make, execute, and appoint the said P. J. Walker, Nathan Bell and E. B. deGolia the subscriber's true and lawful Attorney in Fact, with full power of substitution and revocation, and with power in the subscriber's name, place and stead to represent him for the purposes of exchanging with other subscribers to such Bureau indemnity to the extent described in contracts of indemnity executed and delivered to said subscribers against loss or damage incident to the ownership, maintenance and operation of automobiles. Such Power of Attorney shall be in all respects co-extensive with the powers provided, enumerated, granted and confirmed and subject to all the limitations, modifications and restrictions contained in the rules and regulations of the Insurance Board of the California State Automobile Association Inter-Insurance Bureau, which said Board it is understood and agreed shall consist of an equal number of persons with the Board of Directors of the California State Automobile Association to be elected by said Board of Directors and the said rules and regulations are hereby assented to and approved by this subscriber; the said rules and regulations to be at all times accessible for inspection by the subscriber at the office of the Bureau."

I now offer as Respondent's Exhibit B, certified copy of Proposed Rules and Regulations for the Insurance Board [fol. 111] of the California State Automobile Association Inter-Insurance Bureau, certified to be a true and correct copy of the document filed with the Insurance Commissioner on the 29th day of June, 1914. And may I add, it is the document referred to in the Power of Attorney, just read from which was filed upon the same day.

(Thereupon the document referred to above was admitted into evidence and marked Respondent's Exhibit B.)

Mr. Lasky: I desire to read from the first paragraph, number (1):

"Risks shall be restricted to automobiles of the private pleasure car type. Only members in good standing of the California State Automobile Association, or corporations or firms in which such members are officers or partners may be eligible to apply for insurance in the Bureau. Such insurance shall be limited to not to exceed two cars per member in the case of privately [fol. 112] owned cars, and to not to exceed two cars per membership in the case of cars owned by Corporations or firms, except by special authority of the Executive Committee of the Board."

Will it be stipulated, Mr. Fullenwider, that Exhibits A and B or the original, of which these are certified copies, remained on file with the Insurance Commissioner from the time of filing, June 29, 1914, to date, and that no other documents, powers of attorney, or rules and regulations relating to the California State Automobile Inter-Insurance Bureau were filed with the Commissioner from June 29, 1914 until July 27, 1925?

Mr. Fullenwider: That is a pretty hard stipulation for me to enter into because in 1914 I was but a small lad. I will stipulate to this, which I think is the effect of what you want, that I have examined the file of the Insurance Commissioner on the Respondent and that that file discloses that these two documents were the first Power of Attorney and Rules and Regulations which were filed and that as far as that file discloses no further powers of attorney or rules and regulations were filed until the date just mentioned by Counsel.

Mr. Lasky: In 1925. Well, that stipulation is adequate for the purpose.

I now offer as Respondent's Exhibit C, copy of California State Automobile Association Inter-Insurance Bureau Power of Attorney and Application for Automobile Insurance certified by Mr. Fullenwider as Deputy Insurance Commissioner as being a photostatic copy of the face of the [fol. 113] Power of Attorney and Application for Automobile Insurance filed with the Insurance Commissioner on the 27th day of July, 1925. For the purpose of the offer: So as to continue the story begun on the last two exhibits.

Mr. Fullenwider: Same objection.

Hearing Officer: Same ruling.

Mr. Lasky: Will it be stipulated, Mr. Fullenwider, that the reverse side of this document which you did not photostat was merely a continuance of the form of application?

Mr. Fullenwider: I think I have already made that stipulation.

Mr. Lasky: So you have.

Hearing Officer: The only difficulty was you made the agreement or stipulation with respect to documents which had not been at that time identified in the record. We only marked them off the record.

Mr. Fullenwider: The same stipulation may be made.

Hearing Officer: The same stipulation with respect to Exhibit C. Thank you.

Mr. Lasky: That is received, is it, in evidence?

Hearing Officer: Received and marked Respondent's Exhibit C.

(Thereupon the document referred to above was admitted into evidence and marked Respondent's Exhibit C.)

Mr. Fullenwider: In connection with the exhibit, Mr. Lasky, I don't want to interrupt you, but I would suggest [fol. 114] in the interest of saving time they do speak for themselves and that reading the entire Power of Attorney is somewhat time consuming. I am willing to stipulate if you desire to have it in the transcript, as well as the exhibit, I am willing to stipulate that the reporter may put it in the transcript, merely to save time.

Mr. Lasky: The exhibit will speak for itself. I merely call attention to the fact that the Power of Attorney contains the same provision, that is, "subject to all the limita-

tions, modifications and restrictions contained in the rules and regulations of the Insurance Board of the California State Automobile Association Inter-Insurance Bureau, and the said rules and regulations are hereby assented to and approved by this subscriber," otherwise it will speak for itself.

I now offer as Respondent's Exhibit D, a document certified by Mr. Fullenwider, as Deputy Insurance Commissioner, as being a true and correct copy of the Revised Rules and Regulations of the Insurance Board of the California State Automobile Association Inter-Insurance Bureau, Adopted March 1, 1925, and certified to have been filed with the Insurance Commissioner on the 27th day of July, 1925.

Mr. Fullenwider: Same objection.

Hearing Officer: Same ruling. To be received and marked, Respondent's Exhibit D.

(Thereupon the document referred to above was admitted into evidence and marked Respondent's Exhibit D.)

[fol. 115] Mr. Lasky: And in this connection I call attention to, and desire to read, the short Paragraph (7) of Exhibit D as follows:

"Risks assumed by the Bureau shall be restricted to automobiles of the private pleasure car and commercial car types. Only members in good standing of the California State Automobile Association or corporations or firms in which such members are officers or partners shall be eligible to apply for insurance in the Bureau."

Hearing Officer: It is the same clause in general as that you read from Exhibit B.

Mr. Lasky: The only addition had to do with the addition of commercial cars, but this provision about restriction to members of the California State Automobile Association is the same.

I now offer as Exhibit E, document certified by the Deputy Insurance Commissioner as being a photostatic copy of the face of the Power of Attorney and Application for Automobile Insurance filed by California State Automobile Association Inter-Insurance Bureau on September 2, 1941. And may we have the same stipulation that the reverse side

which you did not photostat is merely a continuation of the application form?

Mr. Fullenwider: So stipulated.

Mr. Lasky: And the whole of the Power of Attorney is here. I offer this in evidence.

[fol. 116] Mr. Fullenwider: Same objection.

Hearing Officer: Same ruling. To be received and marked Respondent's Exhibit E.

(Thereupon the document referred to above was admitted into evidence and marked Respondent's Exhibit E.)

Mr. Lasky: And without reading the Power of Attorney I call attention to the fact that it has the same restriction, that the power is confined to issue insurance in accordance with the rules and regulations of the Inter-Insurance Bureau.

I now offer as Exhibit F, document certified by the Deputy Insurance Commissioner as being a true photostatic copy of the Rules and Regulations of the Insurance Board of the California State Automobile Association Inter-Insurance Bureau, as Amended to Include Liability and Disability Risks. Adopted September 18, 1941, that document being certified as having been filed with the Commissioner September 2, 1941.

Mr. Fullenwider: Same objection.

Hearing Officer: Same ruling. To be received as Respondent's Exhibit F.

(Thereupon the document referred to above was admitted into evidence and marked Respondent's Exhibit F.)

Mr. Lasky: Without reading, I call attention to the fact that Paragraph (7) of Exhibit F is identical with Paragraph (7) of Exhibit D which was filed in 1925.

Hearing Officer: Will it be stipulated, Mr. Fullenwider, [fol. 117] that between July 27, 1925 and September 2, 1941 no other Powers of Attorney or Rules and Regulations were filed with the Insurance Commissioner by California State Automobile Association Inter-Insurance Bureau?

Mr. Fullenwider: I will have to add the same qualification. It will be stipulated that the file which the Insurance Commissioner keeps on the said Bureau discloses no other documents were filed between those dates.

Mr. Lasky: I now offer as Respondent's Exhibit G a document certified by the Deputy Insurance Commissioner

as being a photostatic copy of the face of the Power of Attorney and Application for Automobile Insurance filed with the Insurance Commissioner on the 1st day of October, 1943 by the California State Automobile Inter-Insurance Bureau. And will it be stipulated, Mr. Fullenwider, that the reverse side which was not photostated was merely a continuation of the form of application?

Mr. Fullenwider: So stipulated.

Mr. Lasky: Will it further be stipulated that at the time this Power of Attorney was filed there was no other set of rules and regulations filed?

Mr. Fullenwider: It will be stipulated that the file shows no other.

Mr. Lasky: So that since September 2, 1941 the files of the Insurance Commissioner show no rules and regulations of this Respondent filed?

[fol. 118] Mr. Fullenwider: That is correct. Yes, so stipulated. Did I make my objection to this last document in a Exhibit D? If not, I now do so on the same grounds as heretofore stated.

Hearing Officer: Why is there such a series of filings? Is it that the rules are changed and that the statutes require a refile of these rules?

Mr. Lasky: There were some changes in the Rules and Regulations in 1925. Yes, the statute requires any inter-insurance bureau or reciprocal—and I understand the terms to be identical—to file the power of attorney with the Insurance Commissioner. That power of attorney is the basic document under which such an organization operates. You might call it its constitution or basic charter or bylaws. And in 1941 the Rules and Regulations were expanded to extend to liability insurance.

Hearing Officer: I see; the Rules of the Respondent.

Mr. Lasky: That is right. So that what we have done is to place in evidence the basic document under which this organization is operating.

Hearing Officer: You filed some rules or proposed rules, whichever they are, in 1914 and again in 1925. Is that because there were some substantial changes in the rules at that time, or do you know?

Mr. Lasky: I have not examined the rules to see if they [fol. 119] were substantial or not. My purpose was to show that the only restriction in these rules on the type of risk

that has always been accepted is this one, and it has been continued throughout the organization.

Hearing Officer: And the Power of Attorney of October 1, 1943, why was that filed if there was no change in the rules?

Mr. Lasky: Apparently the only thing that was changed there was the form of application which happens to be on the same document as the power of attorney. It is required to be filed and since it was filed we put it in to make the record complete. It adds nothing at all to the 1941 Power of Attorney. It is the same thing.

Hearing Officer: To the objection there will be the same ruling and the document will be received as Respondent's Exhibit G.

(Thereupon the document referred to above was admitted into evidence and marked Respondent's Exhibit G.)

Mr. Lasky: Now, Mr. Fullenwider, do you have here a certified copy of the transcript of proceedings before the Department of Insurance in the Matter of the Public Hearing on the Proposed Assigned Risk Plan which took place in this office and this room on October 20, 1947?

Mr. Fullenwider: I have a copy of the transcript. It is not certified but I will stipulate that it is a true copy of a true and correct transcript and that the hearing reporter signed [fol. 120] the original.

Mr. Lasky: That stipulation will be sufficient and I so stipulate. Do you have with you exhibits which accompanied and were part of that record?

Mr. Fullenwider: Yes, I have the particular ones you asked for.

Mr. Lasky: Do you also have Exhibit D?

Mr. Fullenwider: That was not one of the ones that was requested.

Mr. Lasky: No, it was not.

Mr. Fullenwider: If you want that it will take me a few moments.

Mr. Lasky: I think it might be well to have that here.

Mr. Fullenwider: Might I suggest, Mr. Hearing Officer, that we take our recess at this time?

Hearing Officer: Ten minute recess.

(Recess.)

Mr. Lasky: Mr. Fullenwider, you have now produced Exhibits D, F(1), F(2), G, and H, part of the record we have just referred to?

Mr. Fullenwider: Yes, that is correct. I have provided in the event of all except D—I have provided copies which I will stipulate are true and correct copies of the exhibits. "D" happens to be the original and in the event it is introduced into evidence or marked for identification in this case [fol. 121], I would like to ask the stipulation that it may be replaced with a copy later.

Hearing Officer: That is permissible. We so agree.

Mr. Lasky: So stipulated. Then I offer as one exhibit the Reporter's Transcript just referred to and the exhibits thereto, just referred to.

Mr. Fullenwider: To which we again object on the grounds it is irrelevant and immaterial. It does not prove any of the allegations in the Accusation in this case and as far as can be determined it does not tend to prove or disprove any of the allegations made by Respondent in his opening statement. So it appears to us certainly that in view of the state of the record at this time and the issues which have heretofore been raised, it is not relevant or germane to them.

Mr. Lasky: The proposed offer in evidence does two things: Number one, it shows the position taken by this Respondent at the hearing which was required by law before any plan could be issued or approved by the Insurance Commissioner. It shows the record we made as to the nature of our Rules and Regulations, basic underwriting policy. It shows we asked at that time that our Power of Attorney on file in this office and the attached Rules and Regulations be considered a part of that record. It is certainly admissible for that purpose.

Number two, it is admissible for another reason as well. [fol. 122] We have made the point in our opening statement that that Statute is unconstitutional because it constitutes an unlawful delegation of power. In very brief form we pointed out wherein the standards laid down by the Statute are wholly inadequate. This transcript will show that in the proceedings which took place and on the basis of which the Insurance Commissioner issued a Plan, he was acting not as an administrative officer but as a legislator; that the matters brought before his attention;

that the considerations argued, urged, by his representative who appeared, were not matters that should be considered by an administrative officer. They were legislative considerations. In other words, this is the factual record which supports our contention that the Statute not only unlawfully delegated power, but that the Commissioner issuing his Plan unlawfully exercised power which he should not have offered. It is long; I can not read the whole thing now; but it is obvious it is appropriate and reference can be made when the time comes for arguing the case to the transcript and the exhibits.

Mr. Fullenwider: I confess that after hearing Respondent's position on it, I must renew my objection. Would it be stated, for example, that if Respondent had not appeared at the hearing and had not made points, that then the Respondent was foreclosed from raising constitutional points in a matter such as this where an Accusation is brought against a Certificate of Authority: I think quite [fol. 123] definitely not and, therefore, I reiterate the fact that any objections which were made or anything else in that nature which was made or called to the Insurance Commissioner's attention at his Hearing on this Plan is irrelevant. I also maintain that this offered exhibit is irrelevant to show whether there were sufficient legislative standards. You do not prove that by what took place at an administrative hearing. You prove that by taking the Statute and looking at it from beginning to end to determine whether there were sufficient standards. And you do the same with the Plan that is promulgated. Evidence of this nature simply does not prove, nor tend to prove, the points which Respondent is urging it for,

Mr. Lasky: Constitutional questions often turn upon the facts of reality on which they are set.

Hearing Officer: I note in the second paragraph of the Accusation to which there has been no stipulation, it is asserted that on the 8th of December, 1947, the Commissioner approved and issued a reasonable plan. I think that the proceedings at that hearing probably are admissible to see whether or not the matters considered there do indicate that it was or was not a reasonable exercise of authority, in addition to the constitutional question of whether it is a lawful delegation or lawful exercise of the delegated authority. I will overrule the objection and receive the

Transcript as offered, as Respondent's Exhibit H, which includes the exhibits thereto that have been indicated.

[fol. 124] Mr. Fullenwider: Now, for the purposes of clarity, Mr. Hearing Officer, may we use the symbols "H(1)," "H(2)", et cetera?

Hearing Officer: I think it might be helpful in referring to it. So if you will mark the transcript itself, "H", and the exhibits. Exhibit D would be H(1).

Mr. Fullenwider: The transcript then is "H".

Hearing Officer: "H," only.

(Thereupon the Document Referred to Above Was Admitted into Evidence and Marked Respondent's Exhibit H.)

Mr. Fullenwider: "H".

Hearing Officer: And Exhibit D thereto will be Exhibit H(1) in this proceeding.

Mr. Fullenwider: This has been marked three times now as an exhibit. So if it is agreeable I will put the date 3-5-48 under the other date. And that is the one in which we may substitute a copy.

Hearing Officer: That is correct.

(Thereupon the Document Referred to Above Was Admitted into Evidence and Marked Respondent's Exhibit H(1).)

Hearing Officer: H(2) is the copy of Exhibit F(1) of the transcript and if you date that—

Mr. Fullenwider: I will also mark it 3-5-48.

Hearing Officer: H(2).

(Thereupon the Document Referred to Above Was Admitted into Evidence and Marked Respondent's Exhibit H(2).)

[fol. 125] Hearing Officer: H(3) in this proceeding will be Exhibit F(2) to the transcript of the hearing on the plan, Exhibit H.

Mr. Fullenwider: I will also mark that 3-5-48.

Hearing Officer: If you will in each instance.

(Thereupon the Document Referred to Above Was Admitted into Evidence and Marked Exhibit H(3).)

Hearing Officer: Exhibit H(4) will be Exhibit G to the transcript—and the date.

(Thereupon the Document Referred to Above Was Admitted into Evidence and Marked Respondent's Exhibit H(4).)

Hearing Officer: And Exhibit H(5) will be Exhibit H to the transcript—and date that please.

(Thereupon the Document Referred to Above Was Admitted into Evidence and Marked Exhibit H(5).)

Mr. Lasky: Now, so the record may be clear, it is understood and stipulated, is it not, that this is the transcript of the hearing which preceded the issuance of the Commissioner's Plan?

Mr. Fullenwider: Yes, that is correct.

Mr. Harrison: If your Honor please, we shall call a witness.

Mr. EDWIN B. DE GOLIA, called as a witness by the Respondent, being first duly sworn, testified as follows:

Hearing Officer: Your full name, please.

[fol. 126] Witness: Edwin B. de Golia.

Direct examination.

Mr. Harrison:

Q. Mr. de Golia, what is your business?

A. Well, I have several kinds of business, but my principal business is insurance.

Q. And has been for many years?

A. I entered it in eighteen hundred eighty-nine and have been identified with it in all kinds of ways ever since.

Q. And are a member of the California State Automobile Association, are you not?

A. Yes, sir.

Q. And also a director of that association?

A. Yes, sir.

Q. The California State Automobile Association was formed in 1907 was it not?

A. Yes, sir.

Q. I show you a copy of the original Articles of Incorporation of California State Automobile Association produced from the files of that Company. To the best of your belief is that a true copy of the Articles?

A. To the best of my knowledge and belief that is correct, sir.

Mr. Harrison: We offer this in evidence, if the Examiner please, and subject to any correction if it is not a correct [fol. 127] copy, Mr. Fullenwider.

Mr. Fullenwider: We are not making any objection to the fact that it is a copy but we do object to the relevancy in this matter. Bear in mind, Mr. Hearing Officer, that we are pretty far afield. That is not a copy of the Articles of Incorporation of Respondent but what appears to be an entirely separate organization and there has been no showing as yet in the record which would indicate how these Articles of Incorporation would tend to prove or disprove the constitutionality of the Assigned Risk Statute or the Plan itself.

Hearing Officer: I agree, it seems to be somewhat remote unless it is going to be shown that the Respondent here is an affiliate or subsidiary of the Auto Club. I don't know that the Automobile Association charters are relevant.

Mr. Harrison: They are relevant in this respect, if the Examiner pleases, because the policy which has been stated by us in our opening statement is that only persons may be insured by the Inter-Insurance Bureau who are members of the California State Automobile Association, and we shall show the connection between the two in just a moment from this witness.

Hearing Officer: I will mark it "I" for identification at this time then. If it is shown to have a bearing we may receive it but can not receive it now.

(Thereupon the Document Referred to Above Was Admitted for Identification Only and Marked Respondent's Exhibit I.)

[fol. 128] Mr. Harrison:

Q. I show you now what purports to be a copy of the Amended Articles of Incorporation dated in 1929, Mr. de Golia. Will you look at that, please, and state whether or not according to the best of your knowledge and belief that is a copy of the Amended Articles adopted at that time and now in force?

A. To the best of my knowledge and belief that is a copy of Amended Articles in 1929.

Mr. Harrison: We offer the Amended Articles.

Hearing Officer: They will be marked "I(1)" for identification at this time. I assume the same objection will be made to the Amended Articles as the original?

Mr. Fullenwider: Yes, the same objection.

(Thereupon the Document Referred to Above Was Admitted for Identification Only and Marked Respondent's Exhibit I(1).)

Mr. Harrison:

Q. And those Amended Articles adopted in 1929 are still in effect, Mr. de Golia?

A. Yes, sir.

Q. Now, you are also connected with the California State Automobile Association Inter-Insurance Bureau, are you not?

A. Yes, sir.

Q. In what capacity?

A. As first a member of the Board and later on a member of the Executive Committee created to manage the affairs of that Association.

[fol. 129] Q. You are a member of the Insurance Board of the Inter-Insurance Bureau?

A. Yes, sir, the Insurance Board.

Q. And that is the Insurance Board which is referred to in the Rules and Regulations which have been introduced here in evidence as Exhibits B, D, and F, is that not so?

A. That is correct.

Q. Now, how long has the California State Automobile Association Inter-Insurance Bureau been in existence?

A. If my memory serves me it was organized in 1914.

Q. 1914?

A. Yes, sir.

Q. And how long have you been a member of the Insurance Board?

A. From its inception.

Q. How many members of the Insurance Board are there?

A. Five.

Q. Of the Insurance Board?

A. Of the Insurance Board? I beg your pardon. As the directors of the parent organization, as we call it, are members of the Insurance Board, there are twenty-one.

Q. Twenty-one directors of the California State Automobile Association?

A. Yes, sir.

[fol. 130] Q. And there are twenty-one members of the Insurance Board of the Inter-Insurance Bureau?

A. Correct.

Q. And they are identical in person, are they?

A. Yes, sir.

Q. So that since 1914 you have been a member of the Board of Directors of the Automobile Association and also a member of the Insurance Board of the Inter-Insurance Bureau?

A. Yes, sir.

Q. Have you also been since 1914 a member of the Executive Committee of the Insurance Board?

A. Yes, sir.

Q. And who are the other members of that Committee at the present time?

A. Senator Breed, Mr. H. J. Brunnier, Mr. Guido Caglieri, all of this District; and Mr. J. E. O'Neill of Fresno.

Q. So there are five members of that Executive Committee?

A. Yes, sir.

Q. And that is the Executive Committee which is referred to in the Powers of Attorney which have been introduced in evidence this morning?

A. Yes, sir.

Q. Now, I call your attention to the Rule of the Inter-Insurance Bureau, numbered (1), among the Rules which were [fol. 131] adopted in 1914 and which were introduced in evidence this morning as Exhibit B, and particularly to this language, quote, "Only members in good standing of the California State Automobile Association, or corporations or firms in which such members are officers or partners may be eligible to apply for insurance in the Bureau," end quote. You are familiar with that rule, are you not?

A. Yes, sir, that is our Bible.

Q. And has that been the rule and policy of the Inter-Insurance Bureau since the time it was formed in 1914?

A. Yes, sir.

Q. Has the Inter-Insurance Bureau ever deviated from that policy?

A. Not to my knowledge.

Q. Why was it that that Rule was adopted restricting insurance to membership in the California State Automobile Association?

[fol. 132] A. Because we wish to furnish to our members, and to our members only, insurance at a reduced price if [fol. 133] possible and under better conditions than could be obtained in the local market, and as we were not organized for profit we could not see the desirability of taking in any but our own members. That was the purpose and sole purpose of organizing that Company, to give them a further service.

Q. That is, to the members of the California State Automobile Association?

A. The members of the California State Automobile Association.

Q. This Insurance Board of which you have spoken, of twenty-one members, is appointed by whom?

A. It is appointed—I am not sure that I am correct about this, but I believe it is appointed—

Mr. Fullenwider: (Interrupting) I will object to the answer by the witness. We are not interested in any conjecture or surmise.

Hearing Officer: Sustained.

Mr. Harrison:

Q. Are you familiar with the procedure by which the Directors of the California State Automobile Association are chosen?

A. Yes, sir.

Q. How are they chosen?

Mr. Fullenwider: I am going to object again on the ground it is incompetent, irrelevant as to what the procedure of choosing the Directors is.

Hearing Officer: Sustained.

[fol. 134] Mr. Harrison:

Q. I will call your attention to Rule (2) of the Rules adopted in 1914, being Exhibit B, to this effect: "The business of the fund shall be subject to the control of the Insurance Board, said Board to be at all times composed

of an equal number of persons with the Board of Directors of the California State Automobile Association, and to be elected by said Board of Directors." Are you familiar with that rule?

A. Yes, sir.

Q. Has it been carried out?

A. Yes, sir.

Mr. Fullenwider: Now, pardon me, might I have a moment to have the first question read back to me? I am trying to get hold of a rule.

(The question was read by the reporter.)

Mr. Harrison:

Q. Is the California State Automobile Association a motor club as that term is used in the Insurance Code?

A. Yes, sir.

Q. Are you familiar with the Powers of Attorney which have been introduced in evidence this morning as Exhibits C, E, G, and A?

A. Well, I am familiar with the Powers of Attorney that have been in force in the operation of the Automobile Association. I presume they are identical.

Q. And copies of which have been filed with the Insurance Commissioner?

A. To the best of my knowledge and belief, yes.

Q. And in the transaction of business by the California State Automobile Association Inter-Insurance Exchange has all of its business been done by the use of those Powers of Attorney?

A. To the best of my knowledge, yes, sir. It is a bureau we call it a bureau and not an exchange.

Hearing Officer: I understood you meant to say bureau when you talked a minute ago—you said "association."

Witness: I think I meant bureau.

Mr. Harrison: He did refer to the Association also, if the Examiner please.

Hearing Officer: Will you read that long question in which exhibits are mentioned and the answer?

(The question referred to was read by the reporter.)

Hearing Officer: Will you change "Automobile Association" in the answer to "California State Automobile Inter-Insurance Bureau."

Mr. Harrison:

Q. And every applicant for insurance, Mr. de Golia, signs a power of attorney in the form shown by those exhibits; does he not?

A. He does if he is accepted.

Q. Yes, in other words, no insurance is issued to anyone without—or, has been issued to anyone without his having signed that power of attorney?

[fol. 136] A. To the best of my knowledge and belief that has been carried out.

Q. Will you state what is the underwriting policy of the California State Automobile Association Inter-Insurance Exchange?

A. The policy was to give insurance to our members provided they were in the judgment of the officers of the Company who accepted the business, good risks, of good character, and who qualified as a good risk as we know it in the insurance circles.

Q. What was the underwriting policy with respect to the insuring of persons who were not members?

A. Who were not members? We could not take them.

Q. And by members, you mean members of what?

A. Of the parent body of the California State Automobile Association.

Q. And that was the body whose Directors choose the Insurance Board?

A. Correct.

Mr. Harrison: I should like to renew at this time the offer of the Articles of Incorporation of the parent body, if the Examiner pleases.

Hearing Officer: I still do not think it is relevant—the fact that there are the same number of directors in the Automobile Association as there are in the Bureau and that the members of the Insurance Board are elected by them.

[fol. 137] Mr. Harrison: And that the benefits of the Bureau are restricted.

Hearing Officer: To the membership of the Association. I think that is not relevant. The documents can remain as “I” and “I(1)” for identification.

Mr. Harrison: That is all then.

Hearing Officer: Any more from this witness?

Mr. Harrison: I am through.

Hearing Officer: Mr. Fullenwider, have you any questions?

Mr. Fullenwider: Yes, I have.

Cross-examination.

Mr. Fullenwider:

Q. Now, Mr. de Golia, did I understand you correctly that you have been not only on the Board but on the Executive Committee of the Respondent, Inter-Insurance Exchange?

A. Yes, sir.

Q. And during what period of years were you on the Executive Committee?

A. Well, it is—on the Executive Committee?

Q. Yes.

A. From its inception.

Q. And continually down to the present time?

A. Yes, sir.

Q. Now, is it the Executive Committee that passes on the risks?

[fol. 138] A. No, sir.

Q. Who passes on the risks?

A. The Manager and his staff.

Q. So that when you were testifying in respect to what the underwriting practice was you were testifying as to what your understanding was rather than as to what you actually knew, is that correct?

A. That is correct, yes. And I might add, as in accordance with the instructions given by the Executive Committee and his staff.

Q. But you do not actually know what risks were passed upon?

A. Not without some particular feature of this one applicant as brought to my attention by some member of Mr. Chalmer's staff or by himself.

Q. Do you know, for example, whether persons who are members of the California State Automobile Association, as distinct from the Bureau, were ever refused insurance because they were not good risks?

A. Yes, sir; I do know that.

Q. You do know that they were?

A. Yes, sir.

Q. And that has been a continuous practice throughout the history of the organization?

A. Yes, sir.

Q. Now, I am going to hand you Exhibits B to, I believe [fol. 139] it is G, inclusive, and I am going to ask you where in the Rules or in the Powers of Attorney appears the authority to refuse those risks?

A. You are asking me something, to examine a document here that is pretty lengthy, sir.

Q. Do you know where that is in the Rules?

Mr. Harrison: Object to it on the ground it is immaterial. The document speaks for itself.

Witness: No, sir, I do not know. If you want me to answer it—

Hearing Officer: Yes, I will overrule the objection. You may answer it. The answer may remain. You do not know is the answer.

Mr. Fullenwider:

Q. I will reiterate the question to have the witness point out where in the Rules that authority is given.

Hearing Officer: You can take what time you need to examine those documents, sir.

Witness: What?

Hearing Officer: You can take whatever time you want to examine those.

Witness: It will take an hour to go all through this. Isn't there some way that can be—

Hearing Officer: You have answered you do not know whether such authority is there. Do you think it is there?

[fol. 140] Witness: I do not know if it is there. It has been a policy of the Committee to instruct the Manager to follow ordinarily good underwriting practice in the direction and acceptance of business. It is left to their discretion.

Mr. Fullenwider:

Q. And as far as you know there is nothing in the Rules in that connection?

A. I am not prepared to say yes or no to that.

Q. Now, Mr. de Golja, during the period July 1, 1942 to January 1, 1947 did the Respondent, Inter-Insurance Bu-

reau, accept any risks which were not members of the California State Automobile Association?

A. So far as I know they have not done so.

Q. Now, you know of your own knowledge, do you not, that there was and has been in this State for some years a voluntary assigned risk plan?

A. Yes, sir.

Q. And you know that for the period from July 1, 1942 to January 1947 the California State Automobile Inter-Insurance Bureau was a participant in that voluntary assigned risk plan?

A. Yes, sir.

Q. And you also know, do you not, that there were risks accepted under the voluntary assigned risk plan by the California State Inter-Insurance Bureau which were not members of the California State Automobile Association?

A. The risks were taken and the applicant was then required to join the Association.

Q. But the risks were taken first?

A. I do not know that procedure; I do not know how that follows; but I do know the Committee was instructed then to see that the person applying for membership in the Bureau should join the Association.

Q. And it is your testimony then that every member who received insurance through the Assigned Risk Plan with you during the period when the Inter-Insurance Bureau was a participant therein did join the Association?

A. So far as I know, yes, sir.

Q. But here again you are circumscribed in your knowledge of what the Manager and his staff actually did?

A. I did not examine every applicant or every individual case.

Q. What do you understand the term "underwriting policy" to mean?

A. Well, that is rather a broad question. I would say the usual practice that is followed by underwriters who are in the insurance business with regard to whether a man is a good risk financially, whether he is a reputable citizen, and whether he is what might be termed a profitable risk, that is to say, he couldn't have a bad accident record.

Mr. Fullenwider: No further questions.

Hearing Officer: Before we proceed I want to correct the record. I don't know that it is important. I think the

[fol. 142] witness understood your question, Mr. Fullenwider, the last long question. The question asked was whether risks during that period that the Association was participating in that Plan were accepted which were not members. And the answer was "yes." And it is your testimony that thereafter every "member" joined. I think you meant every "insured" or every "applicant for insurance." Is that what you understood the question to be?

Witness: Yes, I thought he was referring to applicants rather than members because members already are eligible to be taken provided he can be assumed to be a good risk.

Hearing Officer: While you were participating in this plan you did accept applications for insurance from non-members?

Witness: And if accepted they were required to become members.

Hearing Officer: But you are not sure of that.

Redirect examination.

Mr. Harrison:

Q. Is this your understanding, Mr. de Golia, that before the policy was actually issued the person had to be a member of the Association?

A. That is my understanding they should do that.

Q. You said something in your cross-examination with respect to leaving the administration of underwriting practice to the Manager and his staff. What did you mean by [fol. 143] underwriting practice?

A. Well, following up the usual precautions and procedures which go with the business, are part of the business of accepting risks.

Q. And passing upon those risks?

A. Passing upon those risks.

Q. Do you draw a distinction between underwriting practice as you have defined it and a fundamental underwriting policy?

A. There is a distinction, yes, sir.

Q. Now, with respect to the fundamental underwriting policy of this Inter-Insurance Bureau, will you define that?

A. The underwriting policy was that we were organized to give our members insurance on their application, and we would then exercise—leave it to our Manager to use

the usual protective measures, you may call them, and not take what we would term a bad risk.

Q. Who fixed that underwriting policy?

A. That was left up to the management.

Q. Who determined what the underwriting policy should be?

Mr. Fullenwider: I am going to object on the grounds the question has been substantially asked and answered, that is cross-examination of his own witness, suggestive, leading.

[fol. 144] Hearing Officer: I think we have a certain amount of leeway. You are covering the same ground I believe. Go ahead.

Mr. Harrison:

Q. Referring to the underwriting policy of restricting the insurance benefits to members, who fixed that policy?

A. The Committee.

Q. And the Manager had nothing to do with it?

A. No, sir.

Q. Did he have any discretion or leeway?

A. No, sir.

Q. Was his discretion confined to the underwriting practice of passing on the risk?

A. Yes, sir.

Q. When did you say you began to do insurance business, Mr. de Golia?

A. Eighteen hundred eighty-nine.

Hearing Officer: Anything further, Mr. Fullenwider?

Mr. Fullenwider: No.

Hearing Officer: It is just about noon. To what hour do you gentlemen want to recess?

Mr. Fullenwider: Is one-thirty all right with you, Mr. Hearing Officer?

Hearing Officer: One-thirty will be all right with me. Recess until one-thirty.

[fol. 145] Afternoon Session—Friday, March 5, 1948

Hearing Officer: If you people are ready we will proceed.

Mr. Lasky: Mr. Aston, will you take the stand, please?

MR. THOMAS GEORGE ASTON, JR., called as a witness, being duly sworn, testified as follows:

Hearing Officer: Your full name, Mr. Aston?

Witness: Thomas George Aston, Junior.

Direct examination.

Mr. Lasky:

Q. Mr. Aston, you are the Manager of the assigned Risk Plan that was created by the order of the Insurance Commissioner which is in evidence here?

A. Yes.

Q. You have occupied that position since the Assigned Risk Plan started operation in January of this year, have you not?

A. Yes.

Q. January 17?

A. January 19 it became effective. I was selected by the previous committee in November to serve from the fifteenth of November.

Q. Were you associated or connected with the voluntary assigned risk plan that was in operation for some years in [fol. 146] this State?

A. For a very short period of time, from November of 1947 until the present Plan became effective.

Mr. Fullenwider: Mr. Lasky, I believe that I have agreed to stipulate with you, which I now offer to do, that insofar as anything that is contained in the records of the Assigned Risk Plan, either the old Voluntary plan or the new one, Mr. Aston may testify irrespective of the fact that he was not actually a manager of the old plan until November of last year.

Mr. Lasky: Thank you for that stipulation. I accept it.

Q. And you are the custodian of the records both of the present Plan and of the former voluntary plan?

A. Yes, sir.

Q. Do you have the figures showing the loss ratio of all insurance written during the period of the voluntary plan?

Let me withdraw that question for a moment. It is a fact, is it not, that the voluntary plan was in operation from about the middle of 1942 until the statutory plan—or I will withdraw that—the compulsory plan went into effect in January?

A. Yes.

Q. Now, can you give me the average loss ratio of all insurance written under the voluntary plan for the entire period on bodily injury liability?

[fol. 47] Mr. Fullenwider: Just a moment now. On that question the question can be construed I believe as a preliminary question if it is answered yes or no, and if the witness is instructed to answer it yes or no I will not object. I do intend to object to the follow-up question.

Mr. Lasky: I do think you should answer the question yes or no.

A. No.

Mr. Fullenwider: You do not have those figures?

Witness: Not for the full period.

Mr. Lasky: Q. Do you have it for any period of time?

A. I have it for the period ~~to~~ and including 1945.

Q. Have you any figures for the year '46?

A. No. There has been no call for the experience for 1946.

Q. It has not been compiled.

A. It has not been compiled.

Q. Then from the period from the inception of the voluntary plan in 1942 through 1945 what was the average loss ratio on bodily injury liability insurance written through the voluntary Assigned Risk Plan?

Mr. Fullenwider: Now, at this point we wish to interpose an objection on the ground that the question calls for irrelevant and immaterial matters. Again our objection is three-fold. In the first place this question is immaterial [fol. 148] because it does not tend to prove is immaterial any of the issues in the Accusation. Second, it is irrelevant and immaterial because there has been insufficient foundation laid for this question. And in this connection it is the position of this Department that before this material would be relevant there would have to be a showing that these two plans were identical in their nature. Bear in mind, Mr. Hearing Officer, we are not considering here the old plan. It has gone by the boards. That was a volun-

tary plan. What we are considering here is the new Statute and the new Plan effective January 19, 1948 which was promulgated and put in force pursuant to that Statute. Now, those two plans, may it please the Commissioner, vary widely in their scope. The voluntary plan, for example, sets forth in its first section the purpose of the plan which is "to provide a means by which a risk required to furnish proof of financial responsibility pursuant to and as required by the California Vehicle Code, or that is required to furnish evidence of bodily injury and property damage liability insurance to the California Railroad Commission"—and it covers only those two types of risk, those which are required to furnish proof of financial responsibility pursuant to the California Motor Vehicle Code or those that are required to furnish evidence of bodily injury and property damage liability insurance to the California Railroad Commission. On the other hand, the new Plan, the one which is in evidence as Exhibit 2, is much broader in its scope. Its purpose is to provide insurance to those who are in good faith entitled [fol. 149] to such insurance but are unable to procure it through ordinary methods. And in that connection there are only specific matters definitely alleged in the Plan which will bar a person from the operation, or from being allowed to participate in it. In other words, you have two separate plans. In the first one of which you had to meet a very narrow qualification standard in order to be allowed to come in. You had to be one of those classes to which the law said, "Here, Mister, you have either gotten fouled up with your driver's license or else the Railroad Commission requires this filing, and for that reason you are eligible for this plan." On the other hand, the new one is just as different as night is from day because here it says to the people of California, "We have got a new law now, something that is going to be almost compulsory in its nature. If you can't get insurance and if you so advise us, you can come into our plan unless for one of these very specific things you are not eligible for it." So, we say for that reason, because of the difference in the eligibility rules, because of the difference in the plans, the figures which would pertain to experience under the old plan can have no bearing or relevancy as to the new plan. That is our second specific objection.

Our third specific objection is that this question calls for over-all experience of all carriers which participated

in the plan. It does not confine it to the particular Respond-
[fol. 150] ent whose right to do business is questioned
at this hearing. Now, we believe that the experience of
all is not relevant. If the purpose of this question is to
prove the taking of property or the taking of liberty
without due process of law under Section 1, of the Four-
teenth Amendment, in this connection I wish to call the
attention of the Hearing Officer to certain specific cases.
I particularly wish to call the attention of the Hearing
Officer to the case of Aetna Insurance Company vs. Hyde,
reported in 34 Federal Reporter (2d), 185. This case is
known popularly as the Second Missouri Rate Case. And
in that case the Missouri Commissioner had set forth by
order—provided for certain rate reductions in fire insur-
ance. I will not go into the details of the pleadings because
I do not think it is necessary. There was a somewhat
involved factual situation in the case. Suffice it for our
purpose to say that the Aetna Insurance Company and
other insurance companies challenged that action by the
Insurance Commissioner. And the question arose in the
case where the Insurance Commissioner had made blanket
rules and an over-all increase applicable to all carriers.
And the court said, and I am quoting now from page 194
of the Federal Reporter:

“The method of securing constitutional protection
therefrom was not by striking down the law as a whole
but by according to each individual carrier the right
to test the effect of the law upon it—if the result was
confiscation the law was invalid as to that particular
company, if it was not confiscatory, it was valid as to
[fol. 151] the particular company. Such seems to be
the view of the Supreme Court as to this section.”

And it cites 275 U. S. 440, 48 Supreme Court 174, and 72
Law Edition 357.

Turn to the particular case now which is cited by the
lower Federal Court, and that is the Supreme Court case.
That case again bears the title Aetna Insurance Company
vs. Hyde. This is known, I believe, popularly as the First
Missouri Rate Case. The citation I have already given
in quoting from the Federal Reporter. You will find the
material to which the lower Federal Court made reference
on page 364 of the Law Edition; page 446 of the U. S.
Reports.

The language—I will just read a brief portion of it; it is hard to quote it without giving the entire background of the case but there are a couple of sentences which are particularly applicable. I will quote:

“It is not claimed by nor on behalf of any company that when applied to its business, the reduced rates are or would be too low to permit the company to make a reasonable profit or to have just compensation for its contracts of insurance.”

And then another paragraph further on, quoting:

“It has never been and cannot reasonably be held that state-made rates violate the 14th Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation [fol. 152] to all companies that happen to be engaged in the affected business.”

Now, applying those cases to our situation here, this does not call for the experience of the particular company. This calls for the experience of companies generally, over-all statistics. And we submit that under the tests laid down by these courts, it is insufficient and cannot be used by this particular company. If this evidence be admissible at all, or if evidence of this nature be admissible at all, it must be admissible as respects this particular organization and not any general figures as to carriers in general.

Mr. Lasky: Now, if the Examiner please, if there were any merit whatever in the objection it would go not to the admissibility of this evidence, but its weight. We contend here that this Statute violates the Fourteenth Amendment of the U. S. Constitution and a comparable volume of the State Constitution depriving us of property and liberty without due process. It purports to compel an insurer to take risks that it does not want to take, enter insurance contracts that it does not want to enter, and thereby pay out losses that it does not want to pay out. Here we have the case of a group of individuals who are banded together—careful drivers. They banded together to insure themselves, and the law purports to require them to insure someone else. From the nature of the Assigned Risk Plan it is obvious that these are risks which are greater than the risks that the insurers would be voluntarily

[fol. 153] willing to take. Now, it is impossible to put into evidence what effect the Plan has in the future because that is all in the future. We can only give the experience of the past for such light as it throws on this problem.

Hearing Officer: I think I can agree with part of what each of you has said. To show whether or not, as you contend, it is an unlawful taking of property without due process to force these risks upon the Respondent is the thing that must be determined in the final analysis of the constitutional question. But I do not know whether it requires us to receive evidence of experience of all members of the voluntary plan or whether it shouldn't be limited to this.

I have a question in my mind and I would like to ask—maybe you gentlemen can enlighten me. We have the transcript of the Hearing preceding the adoption of the Plan. Wasn't this sort of thing the material that was furnished at that time at the Hearing before the Commission promulgated its Plan?

Mr. Lasky: Not to my knowledge.

Hearing Officer: I think that strictly speaking it could be said there is a very limited issue here. That is, the Plan having been adopted I might take the attitude that the Plan is in accordance with the requirements of the Statute and then the only question is, did this Respondent comply as required by Statute or not. But if that were to be the issue, in the light of the stipulations that opened this record the [fol. 154] decision might be relatively easy and I do not know how much of this sort of thing that you are now offering should go into this record or how extensive it is going to be before this matter is submitted. It is a question of weight, as you say, and I do not know whether we should have figures as to all experience of companies prior to 1945, prior to the voluntary plan.

Mr. Lasky: Let me answer that one with respect to whether the experience should be for all insurers or our people. Perchance in the past whether one risk was assigned to one insurer or another, the character of these risks and the loss that would be sustained from taking them, the judgment that would be based upon the accidental assignments to one party in the past would be worth little value. But if you take it upon the history of all those involved it throws light on the workings of those in the future. Now, another objection has been raised that perhaps the

plans were different. I think the evidence on that will show that if there are any differences between the two they are minor and that, in fact, the loss ratio is likely to be greater on the present Plan than the other. I think the evidence is admissible and the weight can be determined only after the evidence is in.

Mr. Fullenwider: I can not allow that last statement of Counsel to go unchallenged. I think the judgment would have to be the other way. In the old plan, I am sure, most of them were people that had been convicted of various [fol. 155] offenses and by reason of that conviction had to furnish certificates of insurability before they got their driver's license. It is quite obvious that the new Plan is not limited to that class of business but includes more of the public generally. And obviously the experience under the old plan because of its nature will be bad because you are taking people who have actually been convicted and you are now comparing that plan with the present plan where it may be age group, race, or a minor physical handicap that is going to bring them into the plan. I think your underwriting experience is going to be exactly contrary.

Mr. Lasky: Counsel is indulging in cross-examination upon this subject.

Hearing Officer: Well, I think whether it is cross or direct each of you has asserted matters which might be evidence except I know they are not. It is argument. It seems to me the offer is a little bit too remote for warranting the acceptance here because of remoteness in type, difference in the plans. I will sustain the objection. If you would like to make an offer of proof of what you intended to prove in support of your statements of reasons and your argument, you may make that.

Mr. Lasky: I will make an offer of proof that under the voluntary plan the experience from its inception in 1942 through the end of 1945 for liability on bodily injury was .502, and that offer I understand is rejected.

[fol. 156] Hearing Officer: That offer is rejected for the same reasons that I sustained the objection to the question.

Mr. Lasky: Pardon me, I gave the wrong figure. I withdraw that. The offer is that the figure is .799, rather than .502.

Q. Now, Mr. Aston, can you identify the Voluntary Plan if you were to see a copy of it?

A. Yes.

Mr. Lasky: There have been references, if the Examiner please, as to what the Voluntary Plan was. That is not of record yet and we had better make it of record.

Hearing Officer: That is right.

Mr. Lasky: It is stipulated, is it not, Counsel, that the document I have in my hand and which I now offer as Respondent's Exhibit next in order is a true copy of the Voluntary Plan that was in effect from the middle of 1942 until January of this year, 1948?

Mr. Fullenwider: Reserving objections to relevancy and materiality it is so stipulated.

To the offer I do object on the grounds it is incompetent, irrelevant and immaterial, and does not have any bearing on the issues in this case.

Hearing Officer: All right. The document will be marked "J" for identification. I will sustain the objection at this time on the grounds stated. It seems to me it is a part of the matter to which you have just addressed yourself, in [fol. 157] the offer of proof, but I will mark it for identification.

(Thereupon the document referred to above was admitted for identification only and marked Respondent's Exhibit J.)

Mr. Lasky: It was objected that our other evidence was not pertinent because the two plans might be different. I make this offer to show the similarity of those two plans in order to show the offer of proof should be received.

Hearing Officer: The statements by you as to the similarity and the statements of Mr. Fullenwider were merely an argument on the other question. I do not think we need to incumber the record by going into the original plan. I am letting you make an offer and marking the documents for identification because in the event I am wrong Section 11523 of the Administrative Procedure Act provides that in the event there is an adverse decision the record is supposed to include exhibits admitted or rejected. So I am marking them for identification and suggesting an offer of proof. So anything you think is relevant will be made a part of the record for the purpose that if an appeal is necessary or desirable—without predicting the result of this proceeding. I think that is too remote to the issue as I see it here. I think I understand your purpose. You want to show the

experience of that Plan and show the experience of the Respondent and that the two are unfavorable toward the Respondent, I assume. And therefore, depending on whether your argument is correct or Mr. Fullenwider's is, [fol. 158] as to whether the relative exclusions within the old Plan, so-called, and the new are greater or less, the comparison between your loss ratio and that which you just offered to prove would be greater or less depending on how the thing goes.

Mr. Lasky: Now, in view of what I understand the Examiner's ruling to be, there are some other questions I wanted to ask of this witness so as to show whether the loss ratio under the present Plan would be equal, higher, or higher under the voluntary. Shall I make an offer of proof or ask the questions.

Hearing Officer: You can ask the questions and if Counsel is going to object to them—what is your attitude, Mr. Fullenwider? Are you going to object to that nature of evidence on the same grounds?

Mr. Fullenwider: I am unable to say, Mr. Hearing Officer.

My Lasky:

Q. Now, Mr. Aston, under the old Plan, the Voluntary Plan, a large proportion of the risks which were taken, assigned, and written, were of those who were convicted of drunkenness, is that not so?

A. Yes.

Q. And is it not so that with respect to those the basic premium before the Assigned Risk surcharged was fifty per cent greater than the premium for ordinary insurance?

A. The Manual rate for certified risks which had to file as a result of drunken driving was fifty per cent increase.

[fol. 159] Q. Then a considerable portion of the assigned risks under the Voluntary Plan consisted of those who had been convicted of excessive speed or recklessness resulting in property damage or injury to persons, is that not right?

A. Not so many, very much smaller proportion.

Q. Very much smaller proportion than those convicted of drunkenness?

A. Oh yes.

Q. And is it not a fact that the Manual premium on such risks before the assigned risk surcharged was twenty per cent greater than the premium for like insurance?

A. That is correct, yes.

Q. Now, is it not also true that under the Assigned Risk Plan the other risks were substantially minors and those who had failed to pay judgments?

A. Yes.

Q. And in such case the Manual rate prior to the addition of the assigned risk surcharge was five per cent greater than the normal rate for like insurance?

A. That is correct.

Q. Now, is it not true that the great bulk of the assigned risks under that Plan were for drunkenness and fell under the fifty per cent addition?

A. The great proportion.

Q. Yes. So that would it not be fair to say that of the [fol. 160] insurance that was written under the Voluntary Risk Plan the average premium rate was about 140 per cent of the average rate, greater than the rate for like insurance? In other words, most of it fell in the 150 per cent classification, some in the 120 per cent, and some in the 105 per cent; but if you average it wouldn't most of it be near 140 per cent?

A. I have never made such a calculation. I could not testify as to the correctness of that statement.

Q. But you do say that the bulk of the assigned risks written under that Plan were in the 150 per cent classification?

A. They were increased 50 per cent plus a surcharge.

Hearing Officer: That is not in answer to your question, Counsel, if I may suggest it. The question is were not the bulk in the 150 per cent classification.

Mr. Fullenwider: I am going to object to the question, that it is unintelligible and that the substance of it has already been asked and answered.

Hearing Officer: I don't know—I will overrule the objection but I think you should clarify the question or the witness should answer it. I think his answer did just what Mr. Fullenwider suggests, gives information that is already in the record. I don't think that is what the question called for. He said he had not made the calculation about 140 per cent, and then you are trying to get him to say that [fol. 161] the bulk of it is in the 150.

Mr. Lasky: I will reframe the question.

Q. Would you say that better than one half of the policies issued under the Voluntary Assigned Risk Plan were of a type that carried 150 per cent premium?

Mr. Fullenwider: Just a moment, please. We are going to object on the ground that all this is incompetent, irrelevant, immaterial. I have allowed this to go on just as much as I felt I should in order to see what was to develop but I can not see where those loss ratios under the old plan and extensive examination of them are going to prove anything that is before us in this case and with the new plan. The fact that there were Manual surcharges under the old plan has no bearing on the new Plan. There is no basis, no reason for this questioning.

Mr. Lasky: I will explain what the purpose of it is.

Hearing Officer: I think you have already explained the purpose, Counsel. It was only that Mr. Fullenwider desired, I thought, to hear this line of questioning as to whether or not it was relevant, and now he does not think so. Because this witness, although he has custody of the books, indicated with respect to some of these things he has not made the calculations, but is just speculating, it might be better for you to make an offer of proof if you have any exact schedule of calculations there. And I understand that this is to be preliminary to your showing the actual [fol. 162] experience of the Respondent.

Mr. Lasky: That is right.

Hearing Officer: And from those two positions argue that therefore assuming—as you think want to assume—in your argument that the new plan is comparable to the old, that then the second would be unfavorable to you. Without due process, I think if you make your offer of proof that would be sufficient for this record and I would sustain objections to it because I understand that is your theory and I have sustained objections to the introduction of the old plan and have indicated that I think it is too remote for this Hearing and the issues that are before us.

Mr. Lasky: Now, I have not explained in full the purpose of this particular offer.

Hearing Officer: You may if you want to make further explanation or an explanation.

Mr. Lasky: I shall. And then I will make the offer. It has been suggested by way of suggestion that under the old plan there were certain limited types of risk that were particularly bad and therefore the experience therein would

not be a guide to what the experience would be under the new Plan where the experience would be more comprehensive. The proof I am now offering shows that on these restricted types under the old plan there was a premium surcharged. So that when you take that into consideration, and basing it upon the ordinary premium rates, the [fol. 163] loss ratio under the old plan would be in excess of 100 per cent. The loss ratio will be just about the same as it was under the old plan. The apparent difference between the two will not result in any differences of loss ratio.

Mr. Fullenwider: Counsel in that connection overlooks the new Plan, Exhibit 2 in evidence, Section 2460, which says:

"Each risk assigned under this Plan shall be subject to the rules, rates, minimum premiums, rating plans and classifications which the insurer to which such assignment is made normally applies in this State to risks not subject to the Plan, but such insurer may make a uniform additional charge of 10% for long haul trucking risks and of 15% for all other risks."

You will notice that Counsel in his questions brought out that these were surcharges in addition to which the surcharges under the Plan. Now, the new Plan certainly permits the same surcharges because it says, "minimum premiums, rating plans and classifications which the insurer to which such assignment is made normally applies in this State . . ." So that is why I say this line of testimony is irrelevant, immaterial.

Mr. Lasky: The fact that the risks under the old Plan were of a particular type would not affect the loss ratio as compared to the new Plan because there the premium was greater and with a loss ratio still high, despite a high premium, if on all those where the premium is lower the ratio [fol. 164] is not going to go down any, it is going to go up. This could be shown by an arithmetical calculation, but I have explained the purpose of the offer.

Mr. Fullenwider: It follows that the insurer will follow the same surcharges under the new Plan and there will be no lowering of premium as Counsel anticipates.

Hearing Officer: I am not an insurance expert and I do not know how the mathematical calculations would affect

it but I think you might go ahead with the offer of proof. However, I sustained the objection.

Mr. Lasky: I offer to prove through the witness and the records he has, or is stipulated to have available, that the insurance that was written under the Assigned Risk Plan was of a character that averaged out on the premium over 140 per cent of the normal premium rates applicable to similar insurance.

Hearing Officer: You are speaking of the first?

Mr. Lasky: That is all we have any records of, yes.

Hearing Officer: The voluntary plan. All right. The offer is rejected.

Mr. Lasky:

Q. Now, Mr. Aston, do you have the figures to show the amount, number of risks assumed under the old Voluntary Plan?

A. Yes.

Q. It is a fact, is it not, that the average number of assignments under the Voluntary Plan from 1942 to January [fol. 165] 17, 1948 was 230 per month?

A. Correct.

Q. Now, under the present Plan since January 17, 1948, is it not a fact that the number of applications have been to date 854?

A. No, that was until February 27, it was 800.

Q. Up to February 27, 854. And do you not estimate that the number of applications and assignments that will be made under the Plan will approximate around two thousand a month under the present Plan?

A. One thousand a month is my estimation.

Q. I call your attention to an article in the "Underwriters' Report" for January 1, 1948 where you are quoted as saying that the number of assignments under this present law are expected by you to be nearly two thousand a month. Did you make that statement?

A. No, I did not make that statement.

Q. That is erroneous?

A. Yes, it is. I had no basis on which to make a statement like that in the first place but I recall—

Q. Then you testify that your estimate is that there will be about one thousand a month?

A. About one thousand a month.

Mr. Lasky: That is all.

Hearing Officer: Cross-examination?

Mr. Fullenwider: Might I ask for a short recess before [fol. 166] I determine the extent of cross-examination?

Hearing Officer: Yes, recess until two-fifteen. That is about eight minutes.

(Recess.)

Hearing Officer: Will you resume the stand, Mr. Aston, please.

Cross-examination.

Mr. Fullenwider:

Q. Mr. Aston, you have testified that you have been Manager of the Assigned Risk Plan, first the old one, voluntary one, and then the new statutory one, since November of last year, that is correct, is it not?

A. Yes.

Q. And previous to that had you had any insurance experience?

A. Approximately twenty years insurance experience.

Q. And of that twenty years insurance experience what was the last position that you held?

A. I was Superintendent of the Casualty Department for the Central Surety and Insurance Corporation.

Q. And for how many years did you hold that position?

A. Four years—approximately four years.

Q. And has your twenty years experience been spent in any particular field?

A. No, it has varied considerably. I had claims experience and a considerable part of the time my experience [fol. 167] has been in underwriting field supervision, and also in production work both as a local agent and general agent, and then in the development of production with the company.

Q. And has that twenty years experience been with any particular companies or group of companies or class of insurance? In other words, writing life, fire and casualty, or what?

A. It has been primarily casualty insurance and automobile.

Q. Including automobile?

A. Including automobile, and some material damage such as automobile.

Q. Automobile material damage. Has it included automobile bodily injury?

A. Yes, all types of casualty insurance.

Q. You have had underwriting experience in those lines, have you?

A. Yes.

Q. Now, during your twenty years have you been in contact with insurance casualty underwriters generally?

Mr. Lasky: If the Examiner please, I am going to object now. This is not proper cross-examination. It is not within any issue raised on direct. On direct the witness was asked whether he was custodian of records and what the records showed, and what the records showed was excluded as not being proper. This goes into some other subject. We [fol. 168] sought to get some statistical information of which he was the custodian.

Hearing Officer: This may be preliminary but I think it has probably gone far enough. I will sustain the objection to it.

Mr. Fullenwider:

Q. Now, Mr. Aston, from your experience in the insurance field do you know what the term "underwriting policy" means to insurance men generally?

Mr. Lasky: I object to that as not being cross-examination at all. This witness was not asked about that subject on direct examination.

Hearing Officer: I will sustain the objection on that ground but we are also interested in getting evidence that is relevant. I don't know that we need to show that he is the Department's witness or Respondent's witness. I think this man's experience and position, his understanding of that policy, might be helpful. Answer the question, Mr. Aston.

Mr. Lasky: I object on the ground it calls for this witness's conclusion of law. What the Statute means by underwriting policy is a question of statutory conclusion.

Hearing Officer: I overrule the objection I think—but I would like to hear the question read.

(The question was read by the reporter.)

Hearing Officer: Objection overruled.

Witness: Yes.

Mr. Fullenwider:

Q. And will you tell us what that term means?

[fol. 169] A. Underwriting policy is policy based on underwriting judgment of the hazard of a particular risk, usually divided between the moral risk and the physical risk, on which an underwriter bases his attitude as to the acceptance or rejection of the particular risk.

Mr. Fullenwider: No further questions.

Hearing Officer: Do you have any further questions, Mr. Lasky?

Mr. Lasky: Yes. I regard the questions just asked as direct examination of the Department's witness and want to cross-examine on that.

Hearing Officer: I don't think we have characterized it by any special name. If you have any questions, go ahead.

Redirect examination.

Mr. Lasky:

Q. Mr. Aston, if underwriting policy is judgment based on a hazard of the risk, then any determination that a risk is not a good one to take would in your opinion be within the term "underwriting policy?"

A. Well, it is according to on what basis your premise is as to whether or not it should be taken. If it is a question of the hazard presented by the risk, its size, from the question of either moral hazard or physical hazard—then my answer would be yes.

Q. In other words, any basis upon which an underwriter determines that a particular applicant is not a good hazard [fol. 170] is in your opinion a matter of underwriting policy?

A. Yes.

Q. Then if that be true, Mr. Aston, under the Statute which provides that insofar as possible assignments under the Plan shall be consistent with the underwriting policies of each subscriber, would that not mean that no risk can be assigned to any underwriter if in his opinion it is a bad risk?

A. No, I don't construe it that way at all.

Q. Where do you draw the line of distinction?

A. Well, because a risk is an assigned risk, necessarily comes to the Assigned Risk Plan, because it is not a normal risk. Now, if only a normal risk could be assigned under the Plan the Plan would have no purpose.

Q. Precisely.

A. So my interpretation of this particular law or section of the law is that the Manager insofar as possible should assign risks under the Plan in accordance with the underwriting policies of each particular company. But the Manager does not necessarily have to do that because it might preclude him from making any assignments under the Plan.

Q. Now, Mr. Aston, you have just said that any basis upon which an underwriter determines that a risk because of its hazard should not be placed—it is a fact, is it not, that any risks that come through the Assigned Risk Plan are of such a hazard in nature that insurers will not accept them voluntarily?

[fol. 171] A. Yes, that is true, because if they haven't tried to place them in the normal market they are not eligible to come into the Plan.

Q. So, under your definition of what the Statute means by underwriting policy, risks under the Assigned Risk Plan are contrary to the underwriting policies of the insurer or they couldn't come through the Assigned Risk Plan at all?

A. Yes.

Mr. Lasky: That is all.

Hearing Officer: Any other questions?

Mr. Fullenwider: No, no further questions.

Hearing Officer: Mr. Aston, you may be excused.

Mr. Lasky: I will call Mr. Chalmers.

Mr. GEORGE CHALMERS, called as a witness, being first duly sworn, testified as follows:

Hearing Officer: Your full name?

Witness: George Chalmers.

Hearing Officer: All right, you may be seated.

Mr. Lasky: Before I interrogate this witness, there was something the Examiner said a while ago that I may

have misunderstood concerning the stipulations at the beginning of the case and therefore the issue was: Were we obeying the Plan. I would like to make our position clear. We do not stipulate that the Insurance Commissioner has issued a Plan under the Statute. We merely stipulated [fol. 172] that the Insurance Commissioner issued a particular document which is printed at a particular place. We certainly may raise the issue that the Plan was not issued in pursuance to the Statute and that the Statute itself has no constitutional effect.

Hearing Officer: I understood that you stipulated that on the 8th of December 1947 the Insurance Commissioner did approve and issue a Plan found in Section 11620 and following.

Mr. Lasky: That is right but we do not stipulate to the language of Paragraph II of the Accusation at all. We have changed the language. We have stipulated that the particular document that appears in that particular section—

Hearing Officer: Which is called a Plan, and I suppose is a Plan, although your contention is that the Statute does not authorize him to promulgate such a Plan as he did.

Mr. Lasky: And that the Statute itself is without legal effect.

Hearing Officer: All right.

Mr. Lasky: That is clear?

Hearing Officer: I understand that and if I said anything other than that I did not intend to.

Mr. Lasky: I was not sure I caught it on the fly. I wanted to be sure the record did not misstate our position.

[fol. 173] Direct examination.

Mr. Lasky:

Q. Mr. Chalmers, you are the Manager of the California State Automobile Association Inter-Insurance Bureau?

A. Yes, sir.

Q. You have occupied that position ever since the beginning of the Bureau in 1914?

A. That is correct.

Q. Now, Mr. Chalmers, during that entire period of time have all applicants, or people who have been insured

by the Bureau, executed before insurance was issued to them a power of attorney in the form of the particular one that was outstanding at that time in the form here in the exhibits?

A. Yes, that is right.

Mr. Lasky: Now, I offer to prove through this witness—and I make the offer of proof in view of the past rulings—

Mr. Fullenwider: Pardon me just a moment, I assign this as being somewhat out of order. There has been no objection raised as yet.

Mr. Lasky: All right, I will ask the question. I thought I could speed it up.

Q. Do you have, Mr. Chalmers, the figures showing the loss ratios of the California State Automobile Association Inter-Insurance Bureau for the period 1942 through the year 1945 on the bodily injury?

[fol. 174] A. Yes, I do have that.

Q. What is the average figure for the loss ratio for that period of time?

Mr. Fullenwider: Pardon me just a moment. Would you read the preliminary question back to me?

(The question was read by the reporter.)

Mr. Fullenwider: That calls for bodily injury only and it calls for not under the Plan but generally. We will object to it on the ground it is incompetent, irrelevant and immaterial; has no bearing; proves or disproves none of the issues of this case.

Hearing Officer: Objection sustained. Now you may make your offer.

Mr. Lasky: I will make my offer of proof that the loss ratio, the average for the period of time, 1942 through 1945, of the California State Automobile Association Inter-Insurance Bureau on bodily injury liability insurance was 502.

Witness: What do you want?

Hearing Officer: There is no question to you, Mr. Witness.

Witness: Yes, I know, but I wanted to know if you wanted to correct your—

Hearing Officer: I don't know whether that is on the record or not, Mr. Lasky, but your witness says you are in error.

[fol. 175] Witness: You should have said that the loss ratio during that time on bodily injury—the loss ratio, the ratio of losses incurred on premiums earned including allocated expenses was the figure that you gave.

Mr. Lasky: Well, just a moment please. Your insurance written during that period of time—did you write any insurance of a character that took the 150 per cent premium?

Mr. Fullenwider: Just a moment now. Before we go on I would like to make a motion that the aside statement which came from the witness in respect to the loss ratio of .502 be stricken from the record or else that it be ruled to be simply an amendment of the offer of proof.

Mr. Lasky: I think that is perfectly appropriate. I will amend the offer of proof.

Hearing Officer: To include the witness's statement of the basis of that figure.

Mr. Lasky: The only change, I understand, is that it included allocated claim adjustment expense, and I amend the offer of proof to include that change, yes.

Mr. Fullenwider: And may it be clear in the record that that statement of record is not evidence in this case?

Hearing Officer: Part of the offer of proof and not evidence.

Mr. Harrison: Has the Examiner ruled on the offer?

Hearing Officer: Oh, I'm sorry, I didn't. The offer of [fol. 176] proof is rejected for the reason stated and sustained in the objection to the preceding testimony.

Mr. Fullenwider: Now, this last question on whether they wrote any business that was 150 per cent, well, again I object on the ground it is irrelevant to any of the issues in this case.

Mr. Lasky: The only purpose is to show the figures are comparable in the case of this organization and of the Assigned Risk Plan, the Voluntary Plan we are talking about—comparable things.

Mr. Fullenwider: How can they be talking about comparable things when he takes an over-all loss ratio, and assume that it includes some of the 150 per cent, and he says, "Now, compare that with something that isn't over-all with everything that is in the Assigned Risk Plan."

Mr. Lasky: It shows the disparity between the two is even greater than they appear in the figures. In other words, the confiscation is greater.

Hearing Officer: This last question—I am trying to see the relevancy of this one that the argument on the over-all theory concerned. Maybe that would help me if I understood it a little better. He said here, started to say—then you made an offer of proof—that the average loss ratio, and I assume that was on all business, was .502. And then your question, does this include any 150 per cent premiums. Well, I would think it did.

[fol. 177] Mr. Lasky: The question I desire to bring out is whether they wrote any of that character. I don't want to indicate to the witness what I expect his answer to be on it.

Hearing Officer: All right, I will overrule the objection if that is the purpose.

Mr. Lasky:

Q. During that period of time did you write—what proportion of your business was of that character?

Mr. Fullenwider: Just a moment. We are going to have to object that this is again irrelevant. This has nothing to do with assigned risks.

Mr. Lasky: It simply deals with anything they had where a drunken driver was involved.

Hearing Officer: You can make another offer of proof as you did with the last witness. He gave some of those figures, 150, 125 and 105, and then you made an offer of proof. I think for the same reasons I will sustain the objection and you can make an offer of proof.

Mr. Lasky: All right, I offer to prove that from 1942 through 1945 substantially all the liability insurance written and which is entered into our loss ratio figure which we offered to prove was of the character that took 100 per cent premium only and nothing in excess thereof.

Hearing Officer: All right, go ahead.

Mr. Harrison: What ruling does the Examiner make on that offer?

[fol. 178] Hearing Officer: I'm sorry, I keep forgetting to make the ruling. I reject the offer.

Do you want to ask this witness any questions, Mr. Fullenwider?

Mr. Fullenwider: No, no questions.

Hearing Officer: You may be excused, Mr. Chalmers.

Mr. Lasky: Mr. Examiner, I would like to amend the offer of proof that we made when Mr. Aston was on the stand with relation to the point—ratio figure of .799, to state that also included allocated claim adjustment expenses. May the offer be deemed amended in that respect?

Hearing Officer: Yes, and the same ruling with regard to it.

Mr. Lasky: All right.

Mr. Harrison: Well, now, I neglected to offer those Bylaws when I offered the Articles.

Hearing Officer: Have there been amendments to those Bylaws?

Mr. Harrison: No, they are up to date as amended.

Mr. Fullenwider: Your other witness isn't here, Counsel. Maybe Mr. Chalmers can identify it.

Mr. Harrison: I will ask him.

Mr. Fullenwider: No objection to the recall of Mr. Chalmers.

MR. GEORGE CHALMERS, the witness formerly under examination, resumed the stand.

[fol. 179] Mr. Harrison:

Q. Mr. Chalmers, I show what purports to be the Bylaws of the California State Automobile Association as amended. Will you look at those. According to the best of your knowledge and belief that is a true copy of the Bylaws?

A. Yes, I recognize them as such.

Mr. Harrison: We offer them in evidence.

Mr. Fullenwider: Before making my objection I would like to look at them. (Examines document.)

We will object to the offer on the same grounds stated for the offer of Exhibit I and I(1), the Articles of Incorporation, on the grounds they are irrelevant to this proceeding.

Hearing Officer: The objection will be sustained but the document may be marked "1(2)" for identification.

(Thereupon the Document Referred to Above Was Admitted for Identification Only and Marked Respondent's Exhibit I(2).)

Mr. Harrison: That is all, Mr. Chalmers.

Mr. Lasky: That is the Respondent's case.

Hearing Officer: Anything in rebuttal or further for the Department?

Mr. Fullenwider: Yes. Again might I have two minutes?

Hearing Officer: Two minutes will be all right. We will have a five minute recess—two for you and three for me.

[fol. 180] Hearing Officer: We resume the Hearing now. Is there anything—I think you indicated that was the Respondent's case. Is there anything further for the Department?

Mr. Fullenwider: Yes, I would like to call Mr. Lloyd.

Mr. CECIL C. LLOYD, called as a witness, being first duly sworn, testified as follows:

Hearing Officer: Be seated, and your full name. I guess everyone knows it.

Witness: Cecil C. Lloyd.

Direct examinaiton.

Mr. Fullenwider:

Q. Your address, Mr. Lloyd?

A. My business address?

Q. Yes.

A. 444 California Street, San Francisco.

Q. By whom are you employed?

A. United States Fidelity and Guaranty Company.

Q. In what capacity?

A. Assistant Manager of the San Francisco office.

Q. Approximately how long have you been in that capacity?

A. Since the first of July, 1947.

Q. Have you had previous insurance experience?

A. Yes, I have.

Q. What is that previous experience—was it with an [fol. 181] insurance company?

A. Yes, it was.

Q. And with whom?

A. Hartford Accident and Indemnity Company.

Q. What was your last position with that Company?

A. It was Assistant Superintendent of Liability and

Workmen's Compensation Department of its metropolitan office.

Q. How long were you with the Hartford?

A. Fourteen years as I recall.

Q. In your education did you do any specializing, receive any specialized courses in insurance?

A. Yes, I did.

Q. And will you state in general what type of a course that was.

A. I took Professor Mowbray's insurance courses—all of them—at the University of California.

Q. Now, your experience that you have had over a period of some sixteen years with insurance companies, has that experience dealt with underwriting?

A. Most of the entire time it dealt with underwriting.

Q. And the time you have put in in underwriting, has any of it been put in in connection with bodily injury liability insurance? Would you say a substantial portion?

A. No, I can't say it has been a substantial portion of it. [fol. 182] Q. Approximately how long?

A. Oh, I have been in touch with it to a degree for over a period of ten years but not actively handling the routine detail of it.

Q. Do you know what is meant by insurance men generally by the term underwriting policy?

Mr. Lasky: I object to that as being immaterial, it calls for the conclusion of the witness.

Hearing Officer: Overruled.

Mr. Fullenwider:

Q. And will you tell us what you understand the term underwriting policy to mean?

Mr. Harrison: Same objection.

Hearing Officer: Same ruling.

Witness:

A. My understanding of underwriting policy would be.

Hearing Officer: Just a minute, is that the question? Was not the question, do you know what the general understanding of that term is? Wasn't that your question or is

if this particular witness's understanding. Read the question.

(The first question was read by the reporter.)

Witness:

A. I believe I do.

Mr. Fullenwider:

Q. Will you state what insurance men generally understand the term underwriting policy to be?

Mr. Lasky: Same objection.

[fol. 183] Hearing officer: Same ruling, overruled.

Witness:

A. Well, I think to my knowledge the average person on the street, the underwriter, person engaged in the insurance business, might say that underwriting policy would be the guiding principles laid down or set down in the selection of risks, either by classification or by individual risks, that fall within any given classification.

Mr. Fullenwider:

Q. You have used the term "by classification." Do you mean classification as relates to the hazard that pertains to the particular risk?

A. Well, I meant primarily by insurance classification for rating purposes. Ordinarily the hazard is the most important element in judging the underwriting of a particular classification or a particular risk.

Q. Is membership in a certain club deemed by insurance men generally to be an underwriting policy?

Mr. Lasky: Object to that in the first place as being immaterial what other people think. The question is what is the underwriting of a particular insurer.

Hearing officer: Sustained.

Mr. Fullenwider: No further questions.

Hearing officer: Cross-examination?

Mr. Lasky: No cross-examination.

Hearing officer: You may be excused, Mr. Lloyd. Thank you.

Mr. Fullenwider: Call Mr. Wilkins.

[fol. 184] Hearing officer: Mr. Wilkins. Thank you.

MR. RICHARD P. WILKINS, called as a witness, being first duly sworn, testified as follows:

Hearing officer: Your full name, please.

Witness: Richard P. Wilkins.

Direct examination

Mr. Fullenwider:

Q. Your address, Mr. Wilkins?

A. Business address?

Q. Yes.

A. 401 California Street.

Q. By whom are you employed?

A. Fireman's Fund Insurance Company.

Q. How long have you been with that Company?

A. Since 1921.

Q. What is your present capacity with the Company?

A. Manager of the Automobile Department.

Q. Approximately how long have you been in that capacity?

A. Approximately four years.

Q. Approximately how long have you been connected—strike that. Have you been connected with the underwriting of automobile liability and property damage risk?

A. Since 1921.

Q. Do you know what is understood by insurance men—strike that. Do you understand what insurance men generally—strike that, I will finally get it right. Do you know [fol. 185] what insurance men generally understand the term underwriting policy to mean?

A. I think I do.

Q. Will you tell us what that term means?

Mr. Harrison: Same objection as stated with respect to the previous witness.

Hearing Officer: Same ruling, overruled.

Mr. Lasky: May I point out the first question was, what the insurance men believe the term to mean, the next question was, what does the term mean.

Hearing Officer: Maybe I assumed that it included the previous question. You were asked if you knew what the term generally meant among insurance men. Will you tell us within that understanding what the term underwriting policy means?

Witness:

A. Well, underwriting policy to me would mean the classification of risk, for example, whether or not a company writes long-haul trucking risks, or whether they write taxicab risks, things that would have to do ultimately with the loss ratio of a classification of business or the whole of the business.

Mr. Fullenwider: No further questions.

Hearing Officer: Any questions, Mr. Lasky?

Mr. Lasky: Yes, just a moment.

Cross-examination.

Mr. Harrison:

Q. Mr. Wilkins, the Fireman's Fund has been a com-[fols. 186-200] petitor of the California Automobile Association Inter-Insurance Bureau, has it not?

A. I would say definitely yes.

Q. And were you active in advocating the sort of legislation which was enacted providing for the assignment of risks?

A. Yes.

Mr. Fullenwider: I am going to object on the grounds it is incompetent, irrelevant and immaterial. Legislation is enacted by the legislature.

Mr. Harrison: We are entitled to show we submitted—

Hearing Officer: Objection overruled. Proper cross-examination.

Witness: Yes.

Mr. Harrison:

Q. As a matter of fact, the Inter-Insurance Bureau of the California Automobile Association withdrew from the former Voluntary Plan shortly before this legislation was introduced in the legislature, did it not?

A. That is my recollection.

Q. And it was following that withdrawal that the legislation was introduced?

A. That is correct.

Mr. Harrison: That is all.

Mr. Fullenwider: No further questions.

[fols. 201-202] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 203]

EXHIBIT 1A

STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE

File No. S. F. 5337 A

ACCUSATION

In the Matter of the Certificate of Authority to Transact Liability Insurance of CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTERINSURANCE BUREAU, Respondent

The Insurance Commissioner of the State of California is informed and alleges:

I

That Respondent, California State Automobile Association Interinsurance Bureau, is admitted to transact Liability Insurance and is the holder of a certificate of authority issued by the Insurance Commissioner of the State of California to transact the said class of insurance in this State for the year July 1, 1947-July 1, 1948.

II

That said Insurance Commissioner, pursuant to the provisions of Article 4, Chapter 1, Part 3, Division 2 of the Insurance Code, on the 8th day of December, 1947, approved and issued a reasonable Plan for the equitable apportionment among insurers admitted to transact Liability Insurance, of those applicants for automobile, bodily injury [fol. 204] and property damage insurance who are in good faith entitled to, but are unable to procure such insurance through ordinary methods.

III

That said Insurance Commissioner, on or about December 16, 1947, mailed to the Respondent herein a copy of the said Plan; that the said Plan directed the Respondent to subscribe thereto on or before the effective date of the said Plan; that the effective date of the said Plan was January

19, 1948; that the said Plan contained a form of subscription agreement to be signed by said Respondent.

IV

That the Respondent herein has wholly failed to subscribe to the said Plan on or before January 19, 1948, or at all.

V

That said Insurance Commissioner, on January 20, 1948, mailed a notice to the Respondent herein at its address, 150 Van Ness Avenue, San Francisco 2, California, to subscribe to the said Plan, and the said notice was received by the Respondent herein on January 21, 1948; the said notice required subscription to said Plan on or before February 1, 1948.

VI

That the Respondent wholly failed to comply with the notice set forth in Paragraph V hereof on or before February 1, 1948, or at all.

VII

That the matters alleged in Paragraphs I-VI hereof show that the Respondent has failed to comply with Article 4, Chapter 1, Part 3, Division 2 of the Insurance Code, and by reason of the provisions of Section 11625 thereof the Insurance Commissioner may suspend the certificate of authority of the Respondent to transact Liability Insurance in this State for the period specified in the said Section 11625.

Dated: February 4, 1948.

Wallace K. Downey, Insurance Commissioner, by
Frank Fullenwider, Deputy.

[fol. 206]

EXHIBIT 1B

File No. S. F. 5337 A

STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE

STATEMENT TO RESPONDENT

In the Matter of the Certificate of Authority to Transact
Liability Insurance of CALIFORNIA STATE AUTOMOBILE
ASSOCIATION INTERINSURANCE BUREAU, Respondent

To California State Automobile Association Interinsur-
ance Bureau:

There is attached hereto a copy of an Accusation which is on file with the office of the Department of Insurance, State of California, 417 Montgomery Street, San Francisco 4, California, in the above-entitled and numbered matter, which is hereby served upon you. Affirmative proof of the matter alleged in the said Accusation may subject your certificate of authority to transact Liability Insurance in this State to a suspension.

Unless a written request for a hearing signed by you or on your behalf is delivered or mailed to the Department of Insurance within fifteen (15) days after the said Accusation was personally served on you or mailed to you, you will be deemed to have waived your right to a hearing in the matter and the Department of Insurance may proceed upon the Accusation without a hearing and take action thereon as provided by law.

The request for a hearing may be made by delivering or mailing the enclosed form entitled "Notice of Defense," or by delivering or mailing a notice of defense within fifteen (15) days as provided by Section 11506 of the Government [fol. 207] Code to the Department of Insurance, 417 Montgomery Street, San Francisco 4, California.

The enclosed "Notice of Defense," if signed and filed with said Department of Insurance shall be deemed a specific denial of all parts of said Accusation but you will not be permitted to raise any objection to the form of the Accusation unless you file another separate notice of defense thereon as provided by section 11506 (a) (3) of said Code within the said fifteen (15) days.

You are further notified that if you file any notice of defense within the time permitted, a hearing will be held at a time and place to be later specified.

Dated: February 4, 1948.

Wallace K. Downey, Insurance Commissioner, by
Frank Fullenwider, Deputy.

[fol. 208]

EXHIBIT IC

BEFORE THE DEPARTMENT OF INSURANCE, STATE OF
CALIFORNIA

No. S. F. 5337-A

NOTICE OF DEFENSE

In the Matter of the Certificate of Authority to transact
Liability Insurance of CALIFORNIA STATE AUTOMOBILE
ASSOCIATION INTERINSURANCE BUREAU, Respondent

To: Department of Insurance, State of California, 417
Montgomery Street, San Francisco 4, California.

I, the undersigned and the Respondent named in the
above-entitled proceeding, hereby acknowledge receipt of
a copy of the Accusation and of the Statement to Respond-
ent.

I hereby request a hearing in said proceeding to per-
mit me to present my defense to the charges contained in
said Accusation.

Dated: February 10, 1948.

California State Automobile Association Interin-
surance Bureau, by Geo. Chalmers, Manager—
Attorney in Fact.

[fols. 209-226]

EXHIBIT 1D

STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE, SAN
FRANCISCO

No. S. F. 5337 A

NOTICE OF HEARING

In the Matter of the ~~Certificate of Authority to Transact~~
Liability Insurance of CALIFORNIA STATE AUTOMOBILE
ASSOCIATION INTERINSURANCE BUREAU, Respondent

You are hereby notified that a hearing will be held before the Department of Insurance, State of California, 417 Montgomery Street, 2nd Floor, San Francisco, California, on the 5th day of March, 1948, at the hour of 10:00 o'clock A. M., upon the charges made in the Accusation served upon you. You may be present at the hearing, may be but need not be represented by counsel, may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas and subpoenas duces tecum in accordance with Government Code Section 11510 by applying to the Department of Insurance, State of California, 417 Montgomery Street, San Francisco 4, California.

Dated: February 24, 1948.

Wallace K. Downey, Insurance Commissioner, by
Frank Fullenwider, Deputy.

[fol. 227]

EXHIBIT "A"

STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE

CERTIFICATION

I, Wallace K. Downey, Insurance Commissioner, do hereby certify that the attached photostat is a photostatic copy of the face of the Power of Attorney and Application for Automobile Insurance filed with the Insurance Commissioner on the 29th day of June, 1914.

Wallace K. Downey, Insurance Commissioner, by
Frank Fullenwider, Deputy.

(Here follows 1 Photolithograph, side folio 228)

POWER OF ATTORNEY AND APPLICATION FOR AUTOMOBILE INSURANCE
TO THE

**CALIFORNIA STATE AUTOMOBILE ASSOCIATION
INTER-INSURANCE BUREAU**

AGAINST THE HAZARDS INDICATED (X) BELOW

HAZARD to be taken by Sub	AMOUNT	PREMIUM DEPOSIT	HAZARD to be taken by Sub
Fire and Transportation			\$5000 10000
Theft			Personal Liability
Collision (\$25 deductible)			Workmen's Compensation
Collision (full coverage)			
Property Damage			
Total			Total

WHEREAS, at San Francisco, California, an office has been opened under the name of CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, having called the Bureau, where certain persons, firms and corporations that purchase insurance against the loss or damage from certain hazards arising from the theft or collision and incident to ownership, maintenance and operation of automobiles used by them, and WHEREAS, P. A. Walker, Nathan Shell and G. H. de la Torre, constituting the operative committee of the Insurance Bureau constituted according to the rules hereinafter referred to and Power of Attorney for each of the subscribers to said Bureau, with full power of substitution and revocation

AND WHEREAS, the subscribers have hereby made, covered, and approved the said P. A. Walker, Nathan Shell and G. H. de la Torre, as their sole and exclusive attorneys in fact, with full power of substitution and revocation, and with power to the subscribers' name, firm or corporation of executing with other subscribers to said Bureau indemnity to the extent provided in a certificate of indemnity given by the subscribers against loss of damage incident to the ownership, maintenance and operation of automobiles, with full power of substitution and revocation, and with the power provided, covered, granted and confirmed and subject to all the limitations, qualifications and conditions contained in the rules and regulations of the Insurance Bureau of the California State Automobile Association Inter-Insurance Bureau, which said rules and regulations shall contain of an equal number of persons with the Board of Directors of the California State Automobile Association to be the subscribers and the said rules and regulations are hereby accepted by and approved by this subscriber, the said rules and regulations to be the same as those for insurance by the subscriber at the office of the Bureau.

IN WITNESS WHEREOF, the subscriber has hereunto set his hand and seal this _____ day of _____, 191____.

DESCRIPTION OF AUTOMOBILE

TRADE NAME	MAKE OR MAKE MODEL	TYPE OF BODY	ENGINE POWER	NO. OF CYLINDERS	GEAR BOX POWER	GEAR BOX	GEAR AFTER 30 MILES

The Automobile above described is usually kept, when not in use, in Building situated No. _____

Occupied as a _____

Was this Automobile new or second-hand when purchased by Applicant?

If second-hand, state name and address of party from whom purchased?

The cost to Applicant of this Automobile, including its equipment, is \$ _____

Is automobile fully paid for? _____ If not, state amount unpaid \$ _____

Is Automobile mortgaged or in any way encumbered?

For what purpose will this Automobile be used?

Is Automobile to be used to carry passengers for compensation?

Signature of Applicant _____

IN WITNESS WHEREOF, the subscriber has hereunto set his hand and seal this _____ day of _____, 191____.

191____

Witness _____

(Seal)

[fol. 229] RESPONDENT'S EXHIBIT "B"

CERTIFICATION

I, Wallace K. Downey, Insurance Commissioner, do hereby certify that the attached copy of Proposed Rules and Regulations of the Insurance Board of the California State Automobile Association Inter-Insurance Bureau is a true and correct copy of the said document filed with the Insurance Commissioner on the 29th day of June, 1914.

Wallace K. Downey, Insurance Commissioner, by
Frank Fullenwider, Deputy.

[fol. 230] Copy.

PROPOSED RULES AND REGULATIONS FOR THE INSURANCE BOARD
OF THE CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-
INSURANCE BUREAU

(1) Risks shall be restricted to automobiles of the private pleasure car type. Only members in good standing of the California State Automobile Association, or corporations or firms in which such members are officers or partners may be eligible to apply for insurance in the Bureau. Such insurance shall be limited to not to exceed two cars per member in the case of privately owned cars, and to not to exceed two cars per membership in the case of cars owned by Corporations or firms, except by special authority of the Executive Committee of the Board.

(2) The business of the fund shall be subject to the control of the Insurance Board, said Board to be at all times composed of an equal number of persons with the Board of Directors of the California State Automobile Association, and to be elected by said Board of Directors. They shall hold office for one year and until the election and qualification of their successors, and vacancies shall be filled by the Directors for the unexpired term.

The Insurance Board shall appoint an Executive Committee of three members. Such Committee shall hold at all times the Power of Attorney provided for in Section 2 of an Act entitled: "An act defining certain classes of contracts for the exchange of indemnities, prescribing regulations therefor, and fixing license fee," approved May 1, 1911. Such Power of Attorney so held shall contain full power of substitution and revocation.

The Power of Attorney and application for insurance shall be in the form hereto annexed and the conditions contained therein shall be the rules and regulations of the said Board.

(3) Policies issued by the Bureau shall be limited to the standard forms and standard endorsements thereof, covering against fire, theft, collision damages (\$25.00 deductible). Collision damage (Full coverage) and property damages; provided however, that each such application shall contain provision to the effect that the powers and duties of the attorney-in-fact for the Subscribers to the Bureau shall be subject to the prescription, regulation and control of the Insurance Board of the California State Automobile Association.

(4) A ledger account shall be kept with each Bureau member and said account shall be debited each month with its pro rata amount of loss and expense sustained by the Bureau during that month, in the discretion of the board. This pro rata shall be determined in percentages of the individual credit balance as proportioned to the total premium deposits on hand.

(5) The amount of the individual liability assumed by any member on any single risk is hereby limited to an amount equal to such proportion of such risk as the individual credit balance of premium deposit of such member, bears to the total amount of premium deposits on hand.

(6) The rate of premium deposit payable in advance which shall be collected on each policy of insurance is hereby fixed at 70 per cent of the established board rates for the same line of protection and for the various classes, subdivisions or special and individual risks within each such line.

(7) Amounts of insurance shall be limited as determined in the classification sheets and insurance manuals governing the Pacific Coast Automobile Underwriters Association.

(8) The Anglo California Trust Company of San Francisco is hereby designated as the depository for the Bureau [fol. 232] and the moneys of the Fund shall be deposited therewith on an interest bearing account, subject to check signed by the Attorney-in-fact, and countersigned by one member of the Executive Committee. Said interest as it accrues and is credited to the account of the Fund shall be credited pro rata to the several accounts of the members.

(9) The books and the accounts of the Bureau shall be audited by a certified public accountant employed from time to time at the discretion of the Insurance Board, and shall at all times be open to the inspection of any member of the Board.

(10) Until the further order of the Board, the business of the Bureau, subject to these rules and regulations, and any alterations or modifications thereof, or additions thereto, shall be conducted by a manager under direct employment by the Board, which manager shall be a special agent of this Board for the purpose of carrying out the instructions of the Board, and said Manager shall not be deemed to have any general powers in conducting the business of said Bureau excepting such implied powers as it may be necessary for him to exercise for the purpose of carrying into effect the special instructions of this Board. The executive Committee or Manager may be the attorney-in-fact of the Subscribers of the Bureau, and until the further order of this Board his or their power of attorney shall be in the form heretofore approved by this Board and hereunto annexed.

As full compensation for his services as manager he shall receive the amount of ten (10) per cent of the sums of premium deposit collected on each policy of insurance until the amount so received shall equal the sum of \$500.00 per month, and thereafter and during said time he shall receive a salary of \$500.00 per month.

[fol. 233] (11) The Manager shall execute and deliver to all subscribers to the Bureau, contracts of indemnity among them as herein provided and shall with the authority of the executive committee of the Insurance Board, and in proper cases, and from time to time reinsure the same. He shall have power to adjust and settle all losses that may occur under such contracts, to give, receive, or waive any notices or proofs of loss, to collect from the subscriber all sums of money required to be paid because of such exchange of indemnity, to appear for the Subscriber in any suits, actions, or legal proceedings, and with the authority of the Executive Committee to institute, prosecute and defend, compromise, or settle any suit, action or legal proceeding that may arise out of any such contract; and with the authority of said Executive Committee to do or perform any other or different act that said Subscriber could do in relation to any such contract of exchange of indemnity.

[fol. 234] Unless otherwise endorsed therein all Powers of Attorney shall be for no other or different purpose than that specified in these rules and regulations and shall be subject to the following limitations and conditions, to wit:

(a) The attorney shall not bind the subscribers jointly with other subscribers who may exchange such indemnity, nor shall they create any joint capital or stock, but shall and are hereby given power only to bind the subscriber severally and for himself alone, and the subscriber's liability shall in no event be joint, or joint and several.

(b) The attorney shall have power to require such subscriber to deposit annually in advance upon delivery of the policy, a certain sum called a premium deposit, proportioned in amount to the amount of indemnity agreed to be given such Subscriber, which deposit shall be appropriated for the payment of any liability and for the expenses and disbursements herein provided for. Failure to make such deposit for fifteen days after the time above specified shall automatically suspend such policy without notice.

(c) The Subscriber's aggregate or total liability for losses under his contract shall in no event exceed the amount standing on the books of the exchange to the credit of such subscriber.

(d) The attorney, or the substituted attorney, with the authority of the Executive Committee, shall have power to institute such legal proceeding or action either in his or their own name or in the name of the Inter Insurance Bureau as may be necessary to enforce the provisions of the Power of Attorney and of the policy.

(12) The Executive Committee for the purpose of facilitating the management and prosecution of the inter-insurance herein provided for and protecting the interest of [fol. 235] the subscribers in this Bureau shall be constituted as follows: Such committee shall be at all times composed of the persons selected by the Insurance Board of the California State Automobile Association selected as herein provided. The action of a majority of the committee shall be deemed to be the action of the Committee. They shall have power to enter into a contract of employment with the Attorney-in-fact, or any substitute, and fix his or their compensation or the commission he or they shall receive for the services rendered. The Executive Committee shall prescribe and fix the amount of premium required for insurance and may limit and define the hazards that may be

assumed by the Bureau and the amount of insurance that may be written. All funds of the Bureau shall be under the exclusive control of the Executive Committee and may be invested by said Committee in any of the securities in which the funds of insurance companies are permitted to be invested.

(13) A surplus fund shall be created, equal in aggregate to the amount to be determined by the Insurance Board, not exceeding 5% of the aggregate of the risks written in the preceding year, and shall consist of not to exceed 50% of that portion of the premium deposited on each policy, not required to meet the debts, operating expenses, claims and losses of the Bureau.

(14) The amount of the deposit at any time standing to the subscriber's credit shall be applicable at all times to the discharge of the subscriber's liability for losses and expenses. A separate account of all moneys paid by and due the subscriber shall be kept by said attorney-in-fact and shall be open to the subscriber's inspection.

The Executive Committee shall cause all accounts to be audited as often as it deems necessary and at least once a year.

[fol. 236] The policy issued herein may be cancelled at any time by the Subscriber, or by the Executive Committee by giving ten days' notice in writing to the subscriber personally or by delivering or mailing such notice to his last known address. When cancelled by order of the Executive Committee, the Subscriber shall be entitled to the return of the unearned portion of his premium deposit.

Each subscriber shall be charged with his proportion of the debts, expenses and losses of the Bureau. Upon termination of the policy there shall be returned to the Subscriber that portion of his annual premium deposit which has not been used to pay the debts, expenses and losses of the preceding year, less the amount required for the creation of the surplus fund as defined in paragraph 13, and then standing to his credit.

(15) The Bureau may sue or be sued in its own name. Should it become necessary for any reason to sue the Subscribers of said Bureau, the Subscriber to avoid a multiplicity of suits shall not bring or maintain any suits or other proceedings at law, or in equity, for the recovery of any claim upon, under or by virtue of such contract of indemnity against more than one of the subscribers at any

time, nor shall any suit or proceeding be maintained by him in any court other than the highest court of original jurisdiction. In the event that the final decision in any such suit [fol. 237] or other proceeding shall be adverse to him, such subscriber will bring no suit or other proceeding against any other subscriber. A final decision in any suit or other proceeding by any other Subscriber against any of the other subscribers, shall be taken to be decisive of similar claims, so far as the same subsists, against the Subscriber thereto, absolutely fixing his liability in the premises; and he shall accept and abide by such final decision in the same manner and to the same effect, as if he had been sole defendant in a similar suit or proceeding as to the similar claim against him, so far as the same may subsist, save and except, however, as to the matter of costs and disbursements.

[fol. 238]

EXHIBIT "C"

STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE

CERTIFICATION

I, Wallace K. Downey, Insurance Commissioner, do hereby certify that the attached photostat is a photostatic copy of the face of the Power of Attorney and Application for Automobile Insurance filed with the Insurance Commissioner on the 27th day of July, 1925.

Wallace K. Downey, Insurance Commissioner, by
Frank Fullenwider, Deputy.

(Here follows 1 photolithograph, side folio 239)

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INC. INSURANCE BUREAU

118A

POWER OF ATTORNEY AND APPLICATION FOR AUTOMOBILE INSURANCE

HAZARDS to be written by Bureau	PREMIUM DEPOSIT	X	RISKS to be insured by Bureau	Factory List
Fire and Transportation			Public Liability	Fire Rate
Theft			Chauffeur's Compensation	Theft Rate
Conversion			Total	PD & PL SYMBOLS
Confiscation				
Collision - Vendor's Single Interest				
Collision - \$200 deductible from each claim				
Collision - \$50 deductible from each claim				
Collision - full coverage (no deduction)				
Property Damage - \$200 per Accident				
Total				

NOTES: 1. The California State Automobile Association Insurance Bureau has been created under the name of CALIFORNIA STATE AUTOMOBILE ASSOCIATION INC. and is a corporation organized under the laws of the State of California. It is authorized to issue and guarantee automobile insurance policies and to receive and hold premiums thereon. It is also authorized to issue and guarantee automobile insurance policies and to receive and hold premiums thereon. It is also authorized to issue and guarantee automobile insurance policies and to receive and hold premiums thereon.

ARTICLE II

Section 1. The California State Automobile Association Insurance Bureau is organized as a corporation under the laws of the State of California. It is authorized to issue and guarantee automobile insurance policies and to receive and hold premiums thereon. It is also authorized to issue and guarantee automobile insurance policies and to receive and hold premiums thereon.

Section 2. The California State Automobile Association Insurance Bureau is organized as a corporation under the laws of the State of California. It is authorized to issue and guarantee automobile insurance policies and to receive and hold premiums thereon. It is also authorized to issue and guarantee automobile insurance policies and to receive and hold premiums thereon.

DESCRIPTION AND FACTS WITH RESPECT TO THE PURCHASE OF THE AUTOMOBILE

YEAR	MAKE	MODEL	TYPE OF BODY	WGT.	ENGINE
			(IF YOUR STATE VOUCHER)		
PURCHASED BY THE APPLICANT		ACTUAL COST TO APPLICANT	UNPAID BALANCE	IF PURCHASED UNDER CONTRACT LOAN SHALL BE PAYABLE TO:	
MONTH	YEAR	NEW OR USED		PURCHASED FROM:	

Is automobile equipped with:

- Front Bumper
- Rear
- Bumper Tips - **NO ALLOWANCE FOR THIS EQUIPMENT**
- Locking Device

The Automobile will be used exclusively for _____ and is not used in the rent service or in carrying passengers for compensation.

Car will generally be garaged and operated in _____.

Has any company cancelled or refused to issue automobile insurance to you? _____ If so give name of company, date cancelled, and reason for refusal or cancellation.

Occupation of Applicant (Give kind of business and full name of employer) _____

Business Address: _____ Residence Address: _____

IN WITNESS WHEREOF, The subscriber has hereunto set his hand and seal this _____ day of _____

192 , at _____

Witness: _____

(SIGN HERE)

(Seal)

-239-

[fol. 240]

RESPONDENT'S EXHIBIT "D"

STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE

CERTIFICATION

I, Wallace K. Downey, Insurance Commissioner, do hereby certify that the attached copy of Rules and Regulations of the Insurance Board of the California State Automobile Association Inter-Insurance Bureau, as amended March 1, 1925, is a true and correct copy of the said document filed with the Insurance Commissioner on the 27th day of July, 1925.

Wallace K. Downey, Insurance Commissioner, by
Frank Fullenwider, Deputy.

[fol. 241]

Copy

REVISED RULES AND REGULATIONS OF THE INSURANCE BOARD
OF THE CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER
INSURANCE BUREAU

Adopted March 1, 1925

(1) The purpose and business of the California State Automobile Association Inter-Insurance Bureau, hereinafter called the Bureau, shall be the conducting of an inter-insurance exchange in accordance with the provisions of the act known as the Reciprocal or Interinsurance Act of the State of California, approved June 3, 1921.

(2) The business of the Bureau shall be subject to the control of the Insurance Board, said Board to be at all times composed of an equal number of persons with the Board of Directors of the California State Automobile Association, and to be elected by said Board of Directors. They shall hold office for one year and until the election and qualification of their successors, and vacancies shall be filled by the Directors for the unexpired term.

(3) The Insurance Board shall appoint an Executive Committee of five members. Such Committee shall hold at all times the Power of Attorney of the subscribers of the Bureau provided for in the aforesaid Act. Such Power of Attorney so held shall be in the following form, to wit:

"Whereas, at San Francisco, California, an office has been opened under the name of California State Automobile As-

sociation Inter Insurance Bureau, herein called the Bureau, where certain persons, firms and corporations may exchange indemnity against loss or damage from certain hazards arising from fire, theft or collision, or incident to the sale, purchase, leasing, ownership, maintenance and operation of automobile used by them;

"And whereas, (names of the Executive Committee), constituting the Executive Committee of the Insurance Board, constituted according to the rules hereinafter referred to, hold Power of Attorney for each of the subscribers to said Bureau with full power of substitution and revocation;

"And Whereas (Name of Subscriber), herein known as the subscriber, desires to become a member of said Inter-Insurance Bureau and hereby applies for insurance against the hazards herein indicated, to the extent limited and defined in the policy of insurance which shall be issued by said Bureau, for the term of one year, commencing ———, 19——, at noon and expiring ——— 19——, at noon, upon the automobile, including its body and machinery and equipment, described herein, which description is hereby declared to be true and correct and made a warranty by the subscriber.

"Now therefore, the subscriber does hereby make, execute and appoint the said (Names of the Executive Committee), the subscriber's true and lawful attorney in Fact, with full power of substitution and revocation, and with power in the subscriber's name, place and stead to represent him for the purposes of exchanging with other subscribers to such Bureau indemnity to the extent described in contracts of indemnity executed and delivered to said subscribers against loss or damage incident to the sale, purchase, leasing, ownership, maintenance and operation of automobiles. Such Power of Attorney shall be in all respects co-extensive with the powers provided, enumerated, granted and confirmed, and subject to all the limitations, modifications and restrictions contained in the rules and regulations of the Insurance Board of the California State Automobile Association Inter-Insurance Bureau, and the said rules and regulations are hereby assented to and approved by this subscriber. The said rules and regulations to be at all times accessible for inspection by the subscriber at the office of the Bureau."

[fol. 243] (4) Until the further order of the Board, the business of the Bureau, subject to these rules and regulations, and any alterations or modifications thereof, or additions thereto, shall be conducted by a manager under direct employment by the Board, which manager shall be a special agent of this Board for the purpose of carrying out the instructions of the Board, and said manager shall not be deemed to have any general powers in conducting the business of said Bureau excepting such implied powers as it may be necessary for him to exercise for the purpose of carrying into effect the special instructions of this Board. The Manager, by action of the Executive Committee, may be the Attorney-in-fact of the subscribers of the Bureau, and his power of attorney shall be appended to the power of attorney of the Executive Committee, and shall be in the following form, to wit:

"The undersigned (Members of the Executive Committee) holding Power of Attorney under the foregoing instrument do, by virtue of the power therein contained, hereby appoint (Name of Manager) of San Francisco, California, to be the Attorney of our Principal, for him or in his name, to execute and perform all and every the matters and things mentioned and contained in said Power of Attorney to us, in the same manner, and as fully and effectually as he our said Principal or as we might or could have done, if personally present; hereby ratifying and confirming and agreeing to confirm whatever the said Attorney shall do or cause to be done in and about the premises by virtue of these presents."

(5) The Manager shall execute and deliver to all subscribers to the Bureau, contracts of indemnity among them as herein provided and shall, with the authority of the Executive Committee of the Insurance Board, and in proper cases, and from time to time, reinsure the same. He shall have the power to adjust and settle all losses that may [fol. 244] occur under such contracts, to give, receive or waive any notices or proofs of loss, to collect from the subscriber all sums of money required to be paid because of such exchange of indemnity, to appear for the Subscriber in any suits, actions or legal proceedings, and with the authority of the Executive Committee to institute, prosecute and defend, compromise, or settle any suit, action or legal

proceeding that may arise out of ~~any~~ such contract; and with the authority of said Executive Committee to do or perform any other or different act that said Subscriber could do in relation to any such contract of exchange of indemnity.

(6) Unless otherwise endorsed therein, all Powers of Attorney shall be for no other or different purpose than that specified in these rules and regulations, and shall be subject to the following limitations and conditions, to wit:

(a) The attorney shall not bind the Subscriber jointly with other Subscribers who may exchange such indemnity, nor shall they create any joint or capital stock, but shall and are hereby given power only to bind the Subscriber severally and for himself alone, and the Subscriber's liability shall in no way be joint, or joint and several.

(b) ~~The attorney shall have power to require such~~ Subscriber to deposit annually in advance upon delivery of the policy, a certain sum called a premium deposit, proportioned in amount to the amount of indemnity agreed to be given such Subscriber, which deposit shall be placed to the credit of such Subscriber. The amount of the deposit at any time standing to the Subscriber's credit shall be applicable at all times to the discharge of the Subscriber's liability for losses and expenses.

(c) The accounts of the Bureau shall be so kept as to reveal the individual account of each Subscriber and said account shall be open to the Subscriber's inspection. Said [fol. 245] account shall be debited each month with its pro-rata amount of loss and expense sustained by the Bureau during that month, in the discretion of the Board. This pro rata shall be determined in percentages of such Subscriber's individual annual premium deposit in force as proportioned to the total annual premium deposit in force.

(d) The amount of the individual liability assumed by any subscriber on any single risk is hereby limited to an amount equal to such proportion of such risk as the individual annual premium deposit in force of such subscriber bears to the total annual premium deposits in force.

(e) The Subscribers's aggregate or total liability for losses and expenses under his contract shall in no event exceed the amount standing on the books of the Bureau to the credit of such Subscriber.

(f) A reserve Fund shall be maintained equal in aggregate to the amount to be determined by the Insurance Board. Said Reserve Fund shall be created by charging to the account of each subscriber, each month, a percentage of his annual premium deposit in force; the amount of such percentage to be determined by the Executive Committee, and to be uniform, in any given month, in respect of the several subscribers. The Reserve Fund so created, and including any amounts credited thereto from any other sources, shall not be expended or appropriated, in whole or in part, for any purpose other than the purposes herein specified, to wit: Said Reserve Fund shall be applicable at all times to the payment of losses and/or expenses, in the discretion of the Executive Committee. In event of the Bureau discontinuing business, such part of the Reserve Fund as shall not be required for the payment of losses and/or expenses, shall be distributed among the subscribers; each subscriber receiving such proportion thereof as his individual annual [fol. 246] premium deposit in force bears to the total annual premium deposits in force.

(g) Upon termination of the policy of any subscriber there shall be returned to such subscriber in final settlement of his account, that portion of his annual premium deposit, if any, which has not been used to pay debts, expenses and losses, or for the creation of the reserve fund as hereinbefore provided, and then standing to his credit.

(h) The attorney, or the substituted attorney, with the authority of the Executive Committee, shall have the power to institute such legal proceeding or action either in his or their own name or in the name of the Inter-Insurance Bureau as may be necessary to enforce the provisions of the Power of Attorney and of the policy.

(i) The Bureau may sue or be sued in its own name. Should it become necessary for any reason to sue the Subscribers of said Bureau, the Subscriber to avoid a multiplicity of suits shall not bring or maintain any suits or other proceedings at law, or in equity, for the recovery of any claim upon, under or by virtue of such contract of indemnity against more than one of the Subscribers at any time, nor shall any suit or proceeding be maintained by him in any court other than the highest court of original jurisdiction. In the event that the final decision in any such suit or other proceeding shall be adverse to him, such Subscriber will bring no suit or other proceeding against

any other Subscriber. A final decision in any suit or other proceeding by any Subscriber against any of the other Subscribers shall be taken to be decisive of similar claims, so far as the same subsist, against such Subscriber, absolutely fixing his liability in the premises, and he shall accept and abide by such final decision in the same manner and to the same effect, as if he had been sole defendant in a similar suit or proceeding as to the similar claim [fol. 247] against him, so far as the same may subsist, save and except, however, as to the matter of costs and disbursements.

(7) Risks assumed by the Bureau shall be restricted to automobiles of the private pleasure car and commercial car types. Only members in good standing of the California State Automobile Association or corporations or firms in which such members are officers or partners shall be eligible to apply for insurance in the Bureau.

(8) Policies issued by the Bureau shall be limited to the standard forms and standard endorsements thereof, covering the risks incident to the sale, purchase, leasing, ownership, maintenance and operation of automobiles.

(9) The Executive Committee shall prescribe and fix the rates of premium deposit required for insurance and may limit and define the hazards that may be assumed by the Bureau and the amount of insurance that may be written.

(10) All funds of the Bureau shall be under the exclusive control of the Executive Committee and may be invested by said Committee in any of the securities in which the funds of insurance companies are permitted to be invested, under the laws of the State of California.

(11) The depositories of the Bureau shall be such savings and commercial banks of the State of California as may be designated by the Executive Committee; and the uninvested funds of the Bureau shall be deposited therein in interest bearing accounts, subject to check signed by the Attorney-in-fact, and countersigned by one member of the Executive Committee.

(12) All amounts consisting of interest on investments and or bank deposits received by the Bureau shall inure to the benefit of each subscriber, monthly, in such proportion as his individual annual premium deposit in force [fol. 248] bears to the total annual premium deposits in force.

(13) The books and accounts of the Bureau shall be audited by a certified public accountant employed from time to time at the discretion of the Executive Committee, and at least once each calendar year, and shall be at all times open to the inspection of any member of the Board.

(14) The Executive Committee shall have power to enter into a contract of employment with the Manager, or any substitute, and to fix his compensation, provided that such compensation for any given period shall not exceed two (2) per centum of the total net premium deposits received during such period.

(15) The action of a majority of the Executive Committee at any regularly called meeting shall be deemed to be the action of the Committee.

(16) These rules and regulations may be amended by the affirmative vote of two-thirds of the members of the Insurance Board at any regularly called meeting.

[fol. 249]

EXHIBIT "E"

STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE

CERTIFICATION

I, Wallace K. Downey, Insurance Commissioner, do hereby certify that the attached photostat is a photostatic copy of the face of the Power of Attorney and Application for Automobile Insurance filed with the Insurance Commissioner on the 2nd day of September, 1941.

Wallace K. Downey, Insurance Commissioner, by
Frank Fullenwider, Deputy.

126A

[illegible]

The following are statements of facts known to and declared by the Applicant to be true and policy is to be issued by the Bureau relying on the truth thereof

□□□

11



(Individual, corporation or partnership)

(ii) Applicant is a married woman show occupation of husband and name of employer]

will be principally garaged and used in the above city or town unless otherwise specified herein

1201 A.M. Standard time at the address of the applicant as stated herein.

3 DESCRIPTION OF THE AUTOMOBILE and facts respecting its purchase

Motor

Balance

If Purchased Under Contract Loss Shall Be Payable To

Original Purchase	Date	Cost
-------------------	------	------

Medical

0

Total Premiums
Deposits

5 USE The purposes for which the automobile is to be used are

6. Has any company canceled or refused to issue automobile insurance to you?
(If so, give the name of Company, date canceled, policy number and reason for refusal or cancellation.)

To whom is policy to be sent?

(Give Name and Address)

The applicant hereby appoints the above named payee as agent for the purpose of (a) receiving delivery of said policy (b) receiving payment of any unearned premium refund due under this policy

IN WITNESS whereof, I herewith set my hand and seal this

day of

19

41

PM

District Office

Witness

(Signature of Applicant)

—

250

[fol. 251] RESPONDENT'S EXHIBIT "F"

STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE

CERTIFICATION

I, Wallace K. Downey, Insurance Commissioner, do hereby certify that the attached copy of the Rules and Regulations of the Insurance Board of the California State Automobile Association Inter-Insurance Bureau, as amended to include liability and disability risks adopted September 18, 1941, is a true and correct copy of the said document filed with the Insurance Commissioner September 2, 1941.

Wallace K. Downey, Insurance Commissioner, by
Frank Fullenwider, Deputy.

[fol. 252] Copy

RULES AND REGULATIONS OF THE INSURANCE BOARD OF THE CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU, AS AMENDED TO INCLUDE LIABILITY AND DISABILITY RISKS, ADOPTED SEPTEMBER 18, 1941.

(1) The purpose and business of the California State Automobile Association Inter-Insurance Bureau, hereinafter called the Bureau, shall be the conducting of an inter-insurance exchange in accordance with the provisions of Division One, Part Two, Chapter Three, of the Insurance Code of the State of California relating to Reciprocal Insurers, and hereinafter referred to as the Reciprocal or Inter-Insurance Exchange Act.

(2) The business of the Bureau shall be subject to the control of the Insurance Board, said Board to be at all times composed of an equal number of persons with the Board of Directors of the California State Automobile Association, and to be elected by said Board of Directors. They shall hold office for one year and until the election and qualification of their successors, and vacancies shall be filled by the Directors for the unexpired term.

(3) The Insurance Board shall appoint an Executive Committee of five members. Such Committee shall hold at all times the Power of Attorney of the subscribers of the Bureau, provided for in the aforesaid Act, with full power

of substitution and revocation. Such Power of Attorney so held shall be substantially in the following form, to wit:

"Whereas, at San Francisco, California, an office is conducted under the name of California State Automobile Association Inter-Insurance Bureau, where certain persons, firms and corporations may exchange indemnity, including [fol. 253] liability and disability insurance, against loss or damage incident to the sale, purchase, leasing, ownership, maintenance, operation and use of automobiles.

"Now, therefore, the herein undermentioned insured, known as the subscriber, hereby constitutes and appoints (Names of the Executive Committee) with full powers of substitution and revocation, the subscriber's attorney, and in his name and place authorizes them or their substitute, to represent the subscriber from the date hereof until this Power of Attorney is revoked for the following purposes, to wit:

"1. To exchange with other subscribers in such Inter-Insurance Bureau, indemnity, including liability and disability insurance, to the extent herein or hereafter applied for and described, against loss or damage incident to the sale, purchase, leasing, ownership, maintenance, operation and use of automobiles as herein or hereafter described, and to that end to subscribe and deliver all necessary contracts and to do or perform every other or different act that the subscriber himself could do in relation to any such contract for the exchange of such indemnity.

"2. It is expressly understood that this power of Attorney shall be exercised strictly in conformity with and subject to the rules and regulations of the Insurance Board of said Bureau, and the said rules and regulations are hereby assented to and approved by this subscriber; said Board to be at all times composed of an equal number of persons with the Board of Directors of the California State Automobile Association, and said Rules and Regulations and all modifications thereof, to be at all times on file in the office of said Bureau."

(4) Until the further order of the Board, the business of the Bureau, subject to these rules and regulations, and any alterations or modifications thereof, or additions thereto, shall be conducted by a manager under direct employment by the Board, which manager shall be

a special agent of this Board for the purpose of carrying out the instructions of the Board, and said manager shall not be deemed to have any general powers in conducting the business of said Bureau excepting such implied powers as it may be necessary for him to exercise for the purpose of carrying into effect the special instructions of this Board. The manager, by action of the Executive Committee, may be the Attorney In Fact of the subscribers of the Bureau, and his power of attorney shall be appended to the power of attorney of the Executive Committee, and shall be in the following form, to wit:

"The undersigned (Members of the Executive Committee) holding Power of Attorney under the foregoing instrument, do, by virtue of the power therein contained, hereby appoint (Name of Manager) of San Francisco, California, to be the Attorney In Fact of our Principal, for him or in his name, to execute and perform all and every the matters and things mentioned and contained in said Power of Attorney to us, in the same manner, and as fully and effectually as he our said Principal or as we might or could have done, if personally present: hereby ratifying and confirming and agreeing to confirm whatever the said Attorney In Fact shall do or cause to be done in and about the premises by virtue of these presents."

(5) The Manager shall execute and deliver to all subscribers to the Bureau, contracts of indemnity among them as herein provided and shall, with the authority of the Executive Committee of the Insurance Board, and in proper cases, and from time to time, reinsure the same. He shall have the power to adjust and settle all losses that may occur under such contracts, to give, receive or waive any notices or proofs of loss, to collect from the Subscriber all sums of money required to be paid because of such exchange of indemnity, to appear for the subscriber, in any suits, actions or legal proceedings, and with the authority of the [fol. 255] Executive Committee to institute, prosecute and defend, compromise, or settle any suit, action or legal proceeding that may arise out of any such contract; and with the authority of said Executive Committee to do or perform any other or different act that said subscriber could do in relation to any such contract of exchange of indemnity.

(6) Unless otherwise endorsed therein, all Powers of Attorney shall be for no other or different purpose than that specified in these rules and regulations, and shall be subject to the following limitations and conditions, to wit:

(a) The attorney shall not bind the Subscriber jointly with other Subscribers who may exchange such indemnity, nor shall they create any joint or capital stock, but shall and are hereby given power only to bind the Subscriber severally and for himself alone, and the Subscriber's liability shall in no way be joint, or joint and several.

(b) The attorney shall have power to require such Subscriber to deposit in advance upon delivery of the policy, a premium deposit for the full term of the policy, proportioned in amount to the amount of indemnity agreed to be given such Subscriber, which deposit shall be placed to the credit of such Subscriber. The amount of the deposit at any time standing to the Subscriber's credit shall be applicable at all times to the discharge of the Subscriber's liability for losses and expenses.

(c) Each Subscriber shall be debited each month with his pro rata amount of loss and expense sustained by the Bureau during that month, in the discretion of the Executive Committee. This pro rata shall be that percentage of said amount of loss and expense which the subscriber's individual annual premium deposit in force bears to the total annual premium deposits in force. The accounts of the Bureau shall be so kept as to readily reveal, at any time, the credits and debits applicable to each subscriber, and [fol. 256] said accounts shall be open to the subscriber's inspection.

(d) The amount of the individual liability assumed by any subscriber on any single risk is hereby limited to an amount equal to such proportion of such risk as the individual annual premium deposit in force of such subscriber bears to the total annual premium deposits in force.

(e) The Bureau shall request and secure from the Insurance Commissioner of the State of California a certificate stating that the Bureau has a surplus of Admitted Assets over all liabilities in a sum equal to one and one-half times the minimum paid-in capital required of incorporated insurers issuing policies on a reserve basis and doing the same classes of insurance as this Bureau; and such certificate shall be held by the Bureau during its continued mainte-

nance of such surplus. The subscriber shall have no liability for assessment on a policy issued while such certificate remains in effect. Should such certificate be revoked by the Insurance Commissioner on account of the non-maintenance of said amount of surplus, the subscriber's contingent liability for losses and expenses under any policy issued subsequent to such revocation or remaining in force beyond the date fixed for the next payment of premium deposit shall not exceed an amount equal to and in addition to the amount of premium deposit provided in the policy.

(f) For the protection of the subscribers, a Reserve Fund shall be maintained equal in the aggregate to the amount to be determined by the Insurance Board. Said Reserve Fund may be maintained by debiting each subscriber, at any time designated by the Executive Committee, with a sum based on a percentage of his annual premium deposit; such percentage to be determined by the Executive Committee and to be uniform in respect of the several subscribers. The Reserve Fund so maintained, including any amounts credited thereto from any other source, shall not be expended or appropriated, in whole or in part, for any other purpose than the purposes herein specified, to wit: In the discretion of the Executive Committee said Reserve Fund may be applied to the payment of losses and/or expenses and, when expedient and justified by the Bureau's financial condition to the payment of savings to subscribers upon expiration of their policies; provided that the amount of any savings so paid to such subscribers in any one month shall be based on a uniform percentage of their annual premium deposits.

(g) Upon expiration date of the policy of any subscriber, the amount of his credit balance, representing that part of his premium deposit which has not been used for the purposes hereinbefore provided, may be paid to such subscriber; provided, however, that if, in the determination of the Executive Committee, the payment of such credit balances on all policies expiring in any one month is not justified by the Bureau's financial condition or is not in the interests of all the subscribers, the whole of such credit balances or a uniform percentage of each shall be transferred to the Reserve Fund for the protection of all the subscribers.

(h) In event of the Bureau discontinuing business, any part of the Reserve Fund and of all other funds of the Bureau not standing to the credit of individual subscribers, and not required for the payment of losses and/or expenses and or reinsurance premiums, shall be distributed among the existing subscribers; each such subscriber receiving such proportion thereof, in addition to any amount standing to his individual credit, as his annual premium deposit on policies in force on the date of discontinuance of business bears to the total annual premium deposits on policies then in force.

(i) The attorney, or the substituted attorney, with the authority of the Executive Committee, shall have power to [fol. 258] institute such legal proceeding or action either in his or their own name or in the name of the Inter-Insurance Bureau as may be necessary to enforce the provisions of the Power of Attorney and of the policy.

(j) The Bureau may sue or be sued in its own name. Should it become necessary for any reason to sue the Subscribers of said Bureau, the Subscriber to avoid a multiplicity of suits shall not bring or maintain any suits or other proceedings at law, or in equity, for the recovery of any claim upon, under or by virtue of such contract of indemnity against more than one of the Subscribers at any time, nor shall any suit or proceeding be maintained by him in any court other than the highest court of original jurisdiction. In the event that the final decision in any such suit or other proceeding shall be adverse to him, such Subscriber will bring no suit or other proceeding against any other Subscriber. A final decision in any suit or other proceeding by any Subscriber against any of the other Subscribers shall be taken to be decisive of similar claims, so far as the same subsist against such Subscriber, absolutely fixing his liability in the premises, and he shall accept and abide by such final decision in the same manner and to the same effect, as if he had been sole defendant in a similar suit or proceeding as to the similar claim against him, so far as the same may subsist, save and except, however, as to the matter of costs and disbursements.

(7) Risks assumed by the Bureau shall be restricted to automobiles of the private pleasure car and commercial car types. Only members in good standing of the California State Automobile Association or corporations or firms

in which such members are officers or partners shall be eligible to apply for insurance in the Bureau.

(8) Policies issued by the Bureau shall be limited to the standard forms and standard endorsements thereof, [fol. 259] covering the risks, including liability and disability, incident to the sale, purchase, leasing, ownership, maintenance, operation and use of automobiles.

(9) The Executive Committee shall prescribe and fix the rates of premium deposit required for insurance and may limit and define the hazards that may be assumed by the Bureau and the amount of insurance that may be written.

(10) All funds of the Bureau shall be under the exclusive control of the Executive Committee and may be invested by said Committee; provided that such amount of the Bureau's assets as are required to be maintained by said Reciprocal or Inter-Insurance Act shall be maintained in cash or deposits in solvent banks, or invested in securities of the kind designated for the investment of assets of incorporated insurers having a capital stock by the laws of the State of California.

(11) The depositories of the Bureau shall be such savings and commercial banks of the State of California as may be designated by the Executive Committee; and the uninvested funds of the Bureau shall be deposited therewith subject to check signed by such person or persons as may be designated by the Executive Committee.

(12) All amounts consisting of interest on investments and/or bank deposits received by the Bureau shall inure to the benefit of each subscriber, monthly, in such proportion as his individual annual premium deposit in force bears to the total annual premium deposits in force.

(13) The books and accounts of the Bureau shall be audited by a certified public accountant employed from time to time at the discretion of the Executive Committee, and at least once each calendar year, and shall be at all times open to the inspection of any member of the Board.

(14) The Executive Committee shall have power to enter [fol. 260] into a contract of employment with the Manager, or any substitute, and to fix his compensation, provided that such compensation for any given period shall not exceed one (1) per centum of the total net premium deposits received during such period.

(15) The action of a majority of the Executive Com-

mittee at any regularly called meeting shall be deemed to be the action of the Committee.

(16) These rules and regulations may be amended by the affirmative vote of two-thirds of the members of the Insurance Board at any regularly called meeting.

[fol. 261]

EXHIBIT "G"

STATE OF CALIFORNIA, DEPARTMENT OF INSURANCE

Certification

I, Wallace K. Downey, Insurance Commissioner, do hereby certify that the attached photostat is a photostatic copy of the face of the Power of Attorney and Application for Automobile Insurance filed with the Insurance Commissioner on the 1st day of October, 1943.

Wallace K. Downey, Insurance Commissioner, By
Frank Fullenwider, Deputy.

(Here follow 1 Photolithograph, side folio 262)

Resp. G

134A

[illegible]

The following are statements of facts known to and decided by the applicant to be true and policy to be stated by the Bureau, relying on the truth thereof.

1. **USE.** The purposes for which the automobile is to be used are _____
(Please specify use, or uses.)

2. Except with respect to sufficient lease, conditional sale, mortgage or other encumbrance the applicant is the sole owner of the automobile unless otherwise stated here: _____

3. The insurer has collected any automobile insurance issued to the applicant, nor declined to issue such insurance, unless otherwise stated here: _____
(If so, give the name of Company, date obtained, policy number and reason for refusal or cancellation.)

To whom is policy to be sent? _____
(Give name and address.)

The applicant hereby appoints the above named payee as agent for the purpose of (a) receiving delivery of said policy (b) receiving payment of any unpaid premium deposit retained due under this policy.

IN WITNESS whereof, I have set my hand and seal this 6th day of May 1964 at New York, New York.

1

Executive Summary

██████████

— 33 —

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IV

That the term for which said corporation is to exist is Fifty (50) years from and after the date of its incorporation.

V

That the number of directors of said corporation shall be thirteen (13), and the names and residences of the directors who are appointed for the first year are:

Name	Place of Residence
L. P. Lowe,	San Francisco, California.
Oscar Cooper,	San Francisco, California.
Harry N. Stetson,	San Francisco, California.
J. D. Grant,	Burlingame, California.
Jno. Martin,	Ross, California.
Samuel G. Buckbee,	San Francisco, California.
Chas. C. Moore,	San Francisco, California.
Herbert E. Law,	San Francisco, California.
R. B. Hale,	San Francisco, California.
Leon Sloss,	San Francisco, California.
John A. Britton,	San Francisco, California.
E. R. Dimond,	San Francisco, California.
R. M. Hotaling,	San Francisco, California.

VI

That said corporation has no capital stock and no shares of stock.

In witness whereof, we have hereunto set our hands and [fol. 265] seals this 30th day of August, A. D. 1907.

(Signed) L. P. Lowe; Oscar Cooper; Harry N. Stetson; J. D. Grant; Jno. Martin; Samuel G. Buckbee; Chas. C. Moore; Herbert E. Law; R. B. Hale; Leon Sloss; John A. Britton; E. R. Dimond; R. M. Hotaling. (Seal)

[fol. 266] STATE OF CALIFORNIA,

City and County of San Francisco, ss.

On the 30th day of August, in the year One Thousand Nine Hundred and Seven, before me John J. Quinn, a Notary Public, in and for said City and County, residing therein, duly commissioned and sworn, personally appeared

L. P. Lowe, Oscar Cooper, Harry N. Stetson, J. D. Grant, Jno. Martin, Samuel G. Buckbee, Chas. C. Moore, Herbert E. Law, R. B. Hale, Leon Sloss, John A. Britton, E. R. Dimond and R. M. Hotaling, known to me to be the persons described in, and whose names are subscribed to and who executed the annexed instrument and they acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year last above written.

(Signed) John J. Quinn, Notary Public, in for the City and County of San Francisco, State of California.

No. 2908. Indexed. Filed Aug. 31, 1907. H. I. Mulerevy, Clerk; L. J. Welch, Deputy Clerk.

[fol. 267]

RESPONDENT'S EXHIBIT I-1

ARTICLES OF INCORPORATION AS AMENDED 1929 OF CALIFORNIA STATE AUTOMOBILE ASSOCIATION

Know All Men by These Presents:

That we, the undersigned, residents and citizens of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a private corporation and of incorporating under the laws of the State of California a corporation to be known as and by the name of California State Automobile Association and we hereby certify:

I

That the name of the said corporation shall be California State Automobile Association.

II

That the purposes for which said corporation is formed are:

To promote, advocate and encourage the construction, improvement, betterment, maintenance and repair of proper and necessary roads and highways within the State of Cali-

formia and elsewhere and to properly mark the same with signs required for the information, guidance and warning of users thereof and the regulation of traffic thereon;

To urge the adoption of just, rational and intelligent legislation in reference to roads and highways and the use thereof in said State and elsewhere;

To furnish advice, information and assistance of all kinds to owners and operators of self-propelled vehicles of all kinds operated on land or sea or in the air and to establish and maintain offices, agencies and bureaus in said State and elsewhere for the purpose of collecting and disseminating such information and rendering such service; [fol. 268] To protect and promote the legitimate interests of its members in connection with the purposes herein mentioned and otherwise:

To affiliate with or associate with itself similar organizations;

To promote, supervise and conduct contests designed to determine the efficiency of self-propelled vehicles of all kinds and to certify to the results of such contests.

And said corporation shall have the power to carry out the purposes of its organization as hereinbefore outlined and in furtherance thereof shall have power to buy, sell, lease and let real and personal property; to borrow and to lend money with or without giving or taking security; to collect and receive enrollment fees and dues from the members to be expended in carrying out the purposes hereinabove mentioned and to receive subscriptions, donations and other payments to be so expended in similar activities for the benefit of the members or for the public welfare; to enter into, make, perform and carry out contracts of every kind and for any lawful purpose and generally to do all such things as may be necessary, suitable, requisite or convenient for the accomplishment of the purposes hereinbefore set forth.

III

That the place where the principal business of this corporation is to be transacted is the City and County of San Francisco, State of California.

IV

That the term for which said corporation is to exist is fifty (50) years from and after the date of its incorporation.

V

That the number of Directors of said Corporation shall be twenty-one (21), and the names and residences of the [fol. 269] directors who are appointed for the first year are:

Name	Place of Residence
L. P. Lowe,	San Francisco, California.
Oscar Cooper,	San Francisco, California.
Harry N. Stetson,	San Francisco, California.
J. D. Grant,	Burlingame, California.
Jno. Martin,	Ross, California.
Samuel G. Buckbee,	San Francisco, California.
Chas. C. Moore,	San Francisco, California.
Herbert E. Law,	San Francisco, California.
R. B. Hale,	San Francisco, California.
Leon Sloss,	San Francisco, California.
John A. Britton,	San Francisco, California.
E. R. Dimond,	San Francisco, California.
R. M. Hotaling,	San Francisco, California.

VI

That said Corporation is not organized for pecuniary profit and shall have no capital stock, nor shall any shares of stock be issued, but each member thereof shall have one vote only on all matters requiring the action or sanction of the membership.

In witness whereof, we have hereunto set our hands and seals this 30th day of August, A. D. 1907.

L. P. Lowe, Oscar Cooper, Harry N. Stetson, J. D. Grant, Jno. Martin, Samuel G. Buckbee, Chas. C. [fol. 270] Moore, Herbert E. Law, R. B. Hale, Leon Sloss, John A. Britton, E. R. Dimond, R. M. Hotaling. (Seal.)

STATE OF CALIFORNIA,

City of County of San Francisco, ss:

On the 30th day of August, in the year One Thousand Nine Hundred and seven, before me, John J. Quinn, a Notary Public, in and for said City and County, residing therein, duly commissioned and sworn, personally appeared, L. P. Lowe, Oscar Cooper, Harry N. Stetson, J. D. Grant, Jno. Martin, Samuel G. Buelbee, Chas. C. Moore, Herbert E. Law, R. B. Hale, Leon Sloss, John A. Britton, E. R. Diamond and R. M. Hotaling, known to me to be the persons described in, whose names are subscribed to and who executed the annexed instrument, and they acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year last above written.

John J. Quinn, Notary Public in and for the City and County of San Francisco, State of California.
(Seal.)

[fol. 271]

RESPONDENT'S EXHIBIT I-2

By-Laws of the California State Automobile Association as Amended April 26, 1946

Article I

Name

The Name of the Association Shall Be California State Automobile Association

Article II

Purposes and Powers

Section 1. The purposes and powers of this Association shall be those which are set forth in the Articles of Incorporation as now existing or as the same may be hereafter amended.

Article III

Membership

Section 1. All persons interested in the objects of this Association as hereinabove set forth shall be eligible to membership upon invitation by the Association. There shall be two classes of individual members, namely, "Regular Members" and "Associate Members." An Associate membership shall only be issued in conjunction with a Regular membership to such persons as may be determined by the Board of Directors and subject to such rules and regulations as it may prescribe.

Section 2. Similar Associations interested in the objects of this Association shall be eligible to membership.

Section 3. All notices given or statements or other documents sent to a member pursuant to these By-Laws, or otherwise, shall be deemed to have been given or sent to the Associate Member when mailed in the name of and to the address of record of the Regular Member.

Article IV

Entrance Fees and Dues

Section 1. The entrance fee for each individual Regular Member shall be fixed by the Board of Directors and shall not exceed \$5.00 (Five Dollars). Such fee shall be accompanied with application for membership. There shall be no entrance fee for Associate Members.

Section 2. Each individual Regular Member is to pay as annual dues \$12.00 (Twelve Dollars). The annual dues of an individual Associate Member shall be fixed by the Board of Directors and shall not exceed \$6.00 (Six Dollars).

Section 3. The dues of similar Associations admitted to membership as a body shall be determined by the Board of Directors.

[fol. 272] Section 4. The Board of Directors may at any meeting levy an assessment or assessments for any special purpose consistent with these By-Laws, upon the members of the Association, such assessment or assessments upon any individual member not to exceed the total sum of Two Dollars (\$2.00) in any one year. The notice of assessment

shall specify the time at which such assessment becomes payable.

Section 5. Any member of this Association whose dues or assessments shall remain unpaid for thirty (30) days after they have become due shall be notified by the Secretary that unless such arrears are paid within thirty (30) days thereafter such membership may be suspended or terminated as hereinafter provided.

Section 6. If any dues or assessments shall remain unpaid for sixty (60) days after they have become payable, the membership of any member thus delinquent may be suspended or terminated by the Board of Directors without further notice.

Article V

Government

Section 1. The general management of the policy, affairs, funds and the property of this Association shall be vested in a Board of Twenty one (21) Directors, of whom seven (7) shall constitute a quorum.

Section 2. The officers of this Association shall be a President, a First Vice-President, a Second Vice-President, a Third Vice-President and a Treasurer who shall be elected from among the members of the said Board of Directors at their first Regular meeting following the Annual Membership meeting and a Secretary who need not be a Director. The Board of Directors may also appoint a General Manager, an Assistant Secretary and an Assistant Manager. The offices of Secretary and General Manager may be held by the same person and the offices of Assistant Secretary and Assistant Manager may also be held by one person.

Section 3. If at any time the President shall be unable to act by reason of absence or otherwise, the senior Vice-President present at the meeting shall take his place and perform all the duties of the President. If neither the President nor any of the Vice Presidents are present at any meeting of the Board of Directors, a Chairman may be chosen by a majority vote to preside and act at such meeting.

Article VI

Election of Directors

Section 1. The Directors shall be elected by ballot at the Annual Meeting of the members from the individuals comprising the membership.

Section 2. Subject to the provisions of the following section the Directors shall take office on the day of their election, and their term of office shall be for a period of three years or until their successors are elected.

Section 3. At the first meeting of the Directors elected at the Annual Meeting held in the year 1922, the directors so elected shall draw lots in such manner as they may fix for the purpose of determining which of said directors shall be deemed to have been elected for a term of three years, which of said directors shall be deemed to have been elected for a term of two years and which of said directors shall be deemed to have been elected for a term of one year. When it [fol. 273] has been determined by lots as hereinabove provided that seven of said directors shall be deemed to have been elected for a term of three years, and that seven of said directors shall be deemed to have been elected for a term of two years, and that seven of said directors shall be deemed to have been elected for a term of one, the terms of office of said directors shall expire respectively in accordance with the periods so fixed, and thereafter seven directors only shall be elected annually at the annual meeting of the members and the seven directors so elected annually by the membership shall be deemed elected for the term of three years, or until their successors are elected and qualified.

Article VII

Vacancies

Section 1. Whenever any vacancy shall occur in the membership of the Board of Directors, such vacancy may be filled by appointment by the President, ratified by a majority of the Board of Directors, and the term of such Director shall expire at the end of the term for which his predecessor was elected as herein before provided.

Section 2. Any officer or Director may be removed from office by a two-thirds ($\frac{2}{3}$) vote of the entire membership of

the Board of Directors at any Regular meeting or at any Special meeting called for that purpose.

Article VIII

Powers and Duties of Directors

Section 1. The Board of Directors shall have power:

First: To elect and remove at pleasure all the other officers, agents, attorneys in fact, servants and employees of this Association; prescribe such duties for them as may not be inconsistent with the law or these By-Laws, fix their compensation and at their option require from them security for faithful service.

Second: To conduct, manage, and control the affairs and business of this Association, and to that end, to make such rules and regulations not inconsistent with the law or these By-Laws as it may deem best.

Third: To fix from time to time the place of the office of the Association and to adopt and use a corporate seal.

Fourth: To cause to be kept a complete record of all its minutes and acts and of the proceedings of the members, and to present a full statement at the regular annual meeting of the members showing in detail the assets and liabilities of this Association and generally the condition of its affairs.

Fifth: To act for and represent this Association in all matters affecting its policy, purposes, and interests and to instruct and authorize any of the officers of this Association or any Director or agent to represent it in executing its orders.

Sixth: To fix or remit penalties for violation of rules or for conduct of any member detrimental to the welfare of this Association, and to enforce the same.

[fol. 274] *Seventh:* To allow its officers, Directors, agents or attorneys, such sums for service, clerk hire and expenses as it in its discretion may see fit but no compensation for services shall be allowed the President, any Vice-President or any of the Directors as such.

Eighth: To authorize and inaugurate by resolution at any time a women's Auxiliary to this Association under such rules and regulations for its government as the Directors may see fit to prescribe.

Ninth: To perform such other duties and to exercise such other powers as properly devolve upon a Board of Directors, provided that none of the powers and duties shall be contrary to law or to these By-Laws.

Article IX

Duties of the Officers

Section 1.—President

The President shall preside at all meetings of this Association and of the Board of Directors; call special meetings of the members and also of the Board of Directors at such times as he shall deem proper or as is provided in these By-Laws, affix the name of this Association to and sign all instruments in writing that may require the same and have been approved by the Board of Directors; supervise and control, subject to the direction of the Board of Directors, all the officers, agents, attorneys, servants and employees of this Association and the affairs of the Association in general and discharge such other duties as may be required of him by the Board of Directors consistent with the law and these By-Laws.

Section 2—Vice Presidents

The Vice-Presidents shall assist the President in discharging his duties and functions and in the absence of the latter shall successively succeed to the functions and perform the duties which would devolve upon the President if present.

Section 3—Treasurer

The Treasurer shall receive all the funds of this Association and shall deposit the same in such bank or banks as the Board of Directors may from time to time direct in the name of California State Automobile Association and the same shall be paid out only under the direction of the Board of Directors; keep regular accounts and submit the same to the Board of Directors whenever required; prepare and submit to the annual meeting of the members of the Association a statement showing the financial condition of this Association; and shall perform such other duties as may from time to time be fixed by the Board of Directors.

Section 4—Secretary

The Secretary shall keep a full and complete record of the proceedings of the Board of Directors and of the meetings of the members; keep the seal of the corporation and affix the same to all instruments executed by the President which may require it; countersign all instruments in writing executed by the President when thereto directed by the Board of Directors; keep a list of the names and addresses of the members of this Association; notify members of election to membership, of arrears in dues or assessments and of the meetings of this Association; conduct the correspondence of the Association as thereto directed by the Board of Directors or by the President or other person or body acting under the authority of the Board of Directors; make a report to this Association at the annual meeting of the Board of Directors and of the members of this Association, and perform generally such services as the Board of Directors may from time to time direct.

Section 5

The Assistant General Manager shall perform the duties of the General Manager in the event of his absence or inability to act and the Assistant Secretary shall perform the duties of the Secretary in the event of his absence or inability to act.

Article X

Committees:

Section 1. The Board of Directors may appoint an Executive Committee consisting of the Chairmen of the various standing committees.

Section 2. Such Executive Committee, if chosen, shall have all the powers of the Board of Directors which may be given consistently with the law and such Executive Committee shall exercise such powers in the name of this Association.

Section 3. The Executive Committee shall keep minutes of its proceedings and such minutes shall be entered by the Secretary in the book of proceedings of the Board of Directors.

Section 4. The Board of Directors or the Executive Committee, if appointed, must, at least sixty (60) days before the date of any election appoint a Nominating Committee. The duties of the Nominating Committee shall be as hereinafter stated.

Section 5. The Board of Directors or the Executive Committee, if appointed, may prescribe the necessary regulations for application for membership or may appoint a Membership Committee and invest it with all necessary powers, including, if deemed advisable, the powers of selecting members without the necessity of presenting their candidacy to the Directors or to the Executive Committee.

Section 6. The Board of Directors or the Executive Committee, if chosen, may appoint a County Committee in each county of the State, consisting of five (5) persons who must be members of this Association. If deemed advisable, the chairman only of such county committee shall be appointed with power to appoint the four remaining members of the Committee. County Committees shall represent the Association in their respective counties, and the duties of such committees shall be to further the objects of this Association.

Section 7. The Board of Directors or the Executive Committee, if chosen, may appoint such other committees as it may see fit, and shall have power to discontinue any committee or remove any member thereof at will.

Article XI

Nomination and Election of Directors

Section 1. At least thirty (30) days prior to the date of the Annual Meeting the Nominating Committee shall mail to each member of this Association at his last known address a list containing the names of the members proposed by said Nominating Committee as and for Directors for the ensuing year. Such list shall be known as the Regular Ticket.

[fol. 276] Section 2. An additional list or ticket containing the same number of names may be submitted to the members for election, provided that there be filed with the Secretary at least twenty (20) days prior to the date of such election

a petition nominating such list and signed by at least one-twentieth ($1/20$) of the total membership of the Association. The Secretary shall in such event, and within five (5) days thereafter mail to each member at his last known address such additional list or ticket and such list shall be known as the Special Ticket.

At the ensuing election any member may vote for either ticket as a whole and the ticket securing the greater number of votes shall be declared elected.

Section 3. The Regular Ticket shall contain upon its face a copy of Section 2 of this Article.

Section 4. In the event of a failure to hold the election of Directors at the time contemplated in these By-Laws, the same may be held by order of the President at any subsequent time in the same manner and upon similar notice.

Article XII

Meetings of the Association

Section 1. The annual meeting of the members of this Association for the election of Directors and for the transaction of such business as may come before them, shall be held on the third Thursday in January of each year. If such Thursday falls on a holiday such meeting shall be held on the following Thursday.

Section 2. Special meetings of this Association may be called by the Board of Directors at pleasure upon fifteen (15) days' notice thereof mailed by the Secretary to each member at his last known address, and must be called upon a written request signed by at least one-twentieth ($1/20$) of the total membership of this Association and filed with the Secretary at least twenty (20) days before the date upon which such meeting is desired to be held. In case of such request so filed, the Secretary shall within five (5) days thereafter, mail to each member, at his last known address a notice of such special meeting.

Section 3. Every notice of special meeting shall set forth the purposes for which such meeting is called and no other business beyond that mentioned in the notice shall be transacted at such meeting.

Section 4. At all meetings of this Association, of which due notice has been given, members in attendance or represented by proxy shall constitute a quorum.

Article XIII

Meetings of Directors —

Section 1. The first meeting of the Board of Directors shall be held on the third Thursday in January of each year. If such day falls on a holiday then such meeting shall be held on the Thursday immediately following. For the purpose of organization and for no other purpose the Directors may vote in writing at such meeting for the election of officers and for the appointment of the Executive Committee without the necessity of being personally present.

The Secretary shall be personally present to conduct such meeting and declare the results thereof.

[fol. 277] Section 2. All other meetings of the Board of Directors shall be held when and as called by the President or by a majority of the members of the Board.

Section 3. Notice of all meetings of the Board of Directors shall be given to each member of the Board by the Secretary at least one day prior thereto either by mail, telegraph, in person, or by telephone. If in person or by telephone the Secretary shall so attest in the minutes.

Article XIV

Absence of Quorum and Order of Business

Section 1. If a quorum either of this Association or of the Board of Directors shall not be present at any meeting, the presiding officer or in the absence of a presiding officer, the Secretary may adjourn the meeting to a day and hour fixed by him with the same effect as if a quorum had been present at such meeting and voted such adjournment, provided such adjournment shall not exceed fifteen (15) days.

Section 2. At all meetings the order of business, except when otherwise determined by vote of those present, shall be:

1. Reading of the Minutes.
2. Reports of Officers.

3. Reports of Committees.
4. Elections.
5. Unfinished Business.
6. New Business.

Article XV

Limitation of Expenditures

Section 1. Not more than twenty per cent (20%) of the funds of this Association may be authorized or expended for any one purpose in any one calendar year, without a written notice of intention to exceed said twenty per cent (20%) given to each member at least fifteen (15) days prior to the proposed authorization. Said notice shall set forth the nature and the amount of the proposed expenditure and if, before the expiration of said fifteen days, a majority of the members of this Association protest in writing against the same such expenditure shall not be authorized nor made.

Article XVI

Discontinuance of Membership

Section 1. Any member may withdraw from this Association by giving written notice of his resignation to the Board of Directors and such notice shall operate as a release and assignment to this Association of all such member's interest in the corporation and its property.

Section 2. Any person ceasing from any cause to be a member of this Association shall thereby forfeit all interest in the corporation and its property.

Article XVII

Enforcement of Rules

Section 1. Either the Board of Directors or the Executive Committee, if chosen, shall have power by vote of two thirds ($\frac{2}{3}$) of the members present at any meeting to fine, suspend or expel any member of this Association for conduct deemed harmful to the welfare, interest or character of the Association.

[fol. 278] Section 2. Any member so fined, suspended or expelled, shall have the right to appeal to the full Board of

Directors by written notice of appeal filed with the Secretary within one week after his own notice of the decision appealed from. Upon such appeal being taken, notice shall be given the appellant of the time and place fixed by the Board for the hearing thereof. Any director present at such meeting who is absent when action is taken may cast his vote by filing the same in writing with the Secretary and a vote of a majority of the Directors upon any matter involved in such appeal shall be final.

Article XVIII

Notices in General

Section 1. Wherever in these By-Laws not specifically provided notice shall be deemed to be complete upon the mailing thereof, postage prepaid in the United States Post Office directed to the person for whom it is intended at his last known address.

Article XIX

Amendments

Section 1. These By-Laws may be amended by a vote of two-thirds ($\frac{2}{3}$) of the Board of Directors at any meeting called for that purpose, but no proposition to amend these By-Laws shall be acted upon at any meeting of the Board of Directors unless a written notice thereof, containing a copy of the existing By-Law and stating the proposed change, shall have been given to each member of this Association at least fifteen (15) days prior to the holding of said meeting, and if, before the expiration of said fifteen days a majority of the members of this Association protest in writing against said proposed change such change shall not be made.

Article XX

Membership Card and Emblem

Section 1. The Board of Directors or the Executive Committee if chosen, shall adopt and provide a card of membership in this Association which shall be furnished to each individual member by the Secretary upon election to membership and payment of entrance fee and dues. Such card shall specify the time of expiration of member-

ship which shall be at the expiration of the time for which such members dues are paid.

Section 2. The Board of Directors or the Executive Committee if chosen may also adopt and provide a distinguishing official badge emblem or flag to be used by the members of this Association.

Article XXI

Fiscal Year

Section 1. The fiscal year of the Association for the purpose of conducting its business and estimating its income and expenses shall begin on the first day in January of each year and end on the thirty-first day of December of the same year.

[fol. 279] **Know All Men by These Presents:**

That we, the undersigned, being more than two-thirds ($\frac{2}{3}$) of the thirteen (13) members of the California State Automobile Association, do hereby adopt the same as the By-Laws of this Association.

In Witness Whereof: We have hereunto subscribed our names this fourteenth day of September, 1907.

Oscar Cooper, E. R. Dimond, L. D. Grant, R. M. Hotaling, Herbert E. Law, L. P. Lowe, Jno. Martin, Chas. C. Moore, Leon Sloss.

[fol. 280]

RESPONDENT'S EXHIBIT "J"

California Automobile Assigned Risk Plan

Voluntary Plan for Granting Automobile Bodily Injury and Property Damage Insurance to Specified Risks Unable to Secure it for Themselves.

Article I—Introduction and Miscellaneous Provisions

Sec. 1. Purposes of Plan

The purposes of this Plan are:

- (a) To provide a means by which a risk required to furnish proof of financial responsibility pursuant to

and as required by the California Vehicle Code, or that is required to furnish evidence of bodily injury and property damage liability insurance to the California Railroad Commission (except risks exclusively carrying passengers for hire or compensation), that is in good faith entitled to Automobile Bodily Injury and Property Damage Liability Insurance in the State, but is unable to secure it for itself, may be assigned to an admitted insurer.

(b) To establish a procedure for the equitable distribution of such assigned risks among such admitted insurers.

Sec. 2.

This Plan is a voluntary agreement among all of the insurers, both "stock" and "non-stock," transacting the business of automobile bodily injury liability insurance in the State, adopted in the interest of public service.

Sec. 3.

This Plan shall become effective within 15 days after all admitted insurers writing automobile bodily injury liability insurance in the State (excluding reinsurers which do not write any direct business) have subscribed to the Plan, and [fol. 281] shall apply only to risks that in good faith are entitled to such insurance and are within one of the classes described in Section 1.

Sec. 4.

This Plan shall be available so far as non-residents of the State are concerned, with respect to all motor vehicles registered in this State; that is, the place of registration, if the risk is required to have a license issued by the State of California, rather than the residential address is to govern whether or not a risk is eligible for assignment under the Plan.

Sec. 5. Administration of Plan

The Plan shall be administered by a Governing Committee and a Manager. The Governing Committee (hereinafter referred to as "the Committee") shall consist of five;

one representative from each of the following classes of insurers:

- A. National Bureau of Casualty and Surety Underwriters.
- B. Non-affiliated Stock Insurers.
- C. National Association of Automotive Mutual Insurance Companies.
- D. Non-affiliated Mutual Insurers.
- E. Reciprocal Inter-Insurance Exchanges.

On a date fixed by the Committee, and annually thereafter, all insurers authorized to write automobile bodily injury liability insurance in the State of California and subscribers to the Plan shall elect the Committee to serve for a period of one year and until their successors have been elected. Such election shall be held at an annual meeting to be called by the Committee upon 20 days' notice in writing to all subscribers of the Plan. A majority of the subscribers shall constitute a quorum and voting by proxy shall be permitted. At such annual meeting each respective group of insurers heretofore described shall elect its representative [fol. 282] to the Committee. Upon failure so to do, a representative may be chosen from the group so failing to elect a representative by those in attendance at such annual meeting.

Sec. 6. Duties of Governing Committee

The Committee shall meet as often as may be required for the purpose of reviewing assignment of risks by the Manager and performing the general duties of administration of the Plan. Three members of the Committee shall constitute a quorum.

Sec. 7.

The Committee shall select and appoint a Manager of the Plan for the ensuing year, and shall determine his compensation.

The Committee shall have the authority and power to administer the Plan and shall keep a record of all proceedings of the Committee and be responsible for all property of the Plan. The Committee shall have authority to budget expenses for the estimated costs of administering the Plan, to levy assessments therefor, and to pay the expenses of

administering the Plan. The Committee shall collect all fees and other money payable to the Plan and deposit same in a bank designated by it to the credit of the California Automobile Assigned Risk Plan and shall keep proper account of all such funds. Funds of the Plan shall be disbursed only in payment of necessary expenses for the administration of the Plan. The Committee may designate one or more individuals to sign in the name and on behalf of the California Automobile Assigned Risk Plan Governing Committee in the transaction of its business, checks and drafts, subject to such approval as the Committee may determine. Each person authorized to sign checks or drafts on behalf of the Plan shall give a bond in such sum as the Committee may require for the faithful and honest discharge of his duties and for the faithful and honest receipt, custody and disbursement of the funds of the Plan.

[fol. 283] Sec. 8.

The Committee shall semi-annually, as of the first day of July and January, report in writing to all subscribers to the Plan the assignments made under this Plan for the preceding six months, in such form and detail as the Committee may determine. The Committee shall also semi-annually submit to all subscribers to the Plan a true and correct statement of all receipts and disbursements of the Committee for the period subsequent to the last previous report.

Sec. 9. Effective Date

The Plan shall become effective 12:01 a.m. of a date to be fixed by the Committee in accordance with the provisions of Section 3.

Sec. 10. Coverage Available under Plan

No insurer shall be required to write a policy for limits higher than the standard limits of \$5,000/\$10,000 bodily injury and \$5,000 property damage, unless such limits are required by the law or regulation under which the evidence of coverage is to be filed. The insurer to which the risk is assigned shall comply with the filing requirements applicable to the risk.

The following rules shall govern the insuring of risks which have been unable to obtain automobile bodily injury

and property damage liability insurance and are within one of the classes described by Section 1. The Plan shall apply only to risks that in good faith are entitled to such insurance.

Article II—Eligibility

Sec. 20. Qualifications

No applicant shall be eligible to this Plan unless within 60 days prior to the date of his application for insurance under this Plan he has applied for both automobile bodily injury and property damage liability insurance to at least THREE insurers, including the carrying insurer if the risk [fol. 284] is insured at the time of making the application, authorized to write such insurance in the State, and has been definitely refused coverage by each such insurer in writing on the letterhead of the insurer and signed by a full-time salaried employee of the insurer, or by each such insurer in writing signed by an authorized representative of such insurer, the names of which authorized representatives have been specifically designated and filed in writing by each such insurer with the Manager of the Plan. No individual signing such a letter as the "authorized representative" of any insurer shall sign any other such letter to the same applicant in the capacity of an authorized representative of any other insurer, and no office or agency representing more than one insurer shall furnish more than one such letter to any applicant.

Sec. 21.

Each insurer subscribing to this Plan has, by such subscription, indicated its willingness to furnish letters of declination in the form and manner prescribed in this Article.

Sec. 22. Convictions

This Plan shall apply only to risks that in good faith are entitled to such insurance. A risk shall not be considered to be in good faith entitled to insurance nor is an insurer required to extend coverage in any case in which the applicant or anyone who will drive the motor vehicle has:

- (a) During a three-year period immediately preceding the date of application been convicted more than twice of one, or more than once each for two, of the

following offenses growing out of separate violations of the law of this State:

(1) Driving a vehicle while intoxicated or under the influence of intoxicating liquor in violation of Section 502 of the Vehicle Code.

[fol. 285] (2) Driving a vehicle in a reckless manner where injury to person actually results therefrom.

(b) During the same period been convicted more than once of one, or once each for two or more, of the following offenses growing out of separate violations of the law of this State:

(1) Failing to stop and report when involved in an accident as required by Section 480 of the Vehicle Code.

(2) Manslaughter or negligent homicide resulting from the operation of a motor vehicle.

(3) Driving when addicted to the use, or under the influence, of narcotics or other drugs.

(4) Theft or unlawful taking of a vehicle in violation of Section 503 of the Vehicle Code, or grand theft of a motor vehicle.

(5) Any felony in the commission of which a motor vehicle is used.

(6) Driving while under the influence of intoxicating liquor and causing the death of or bodily injury to any person in violation of Section 501 of the Vehicle Code.

(7) Operating during period of revocation or suspension of registration or license.

(8) Permitting any unlawful use of an operator's or chauffeur's license, or any other offense under Section 338 of the Vehicle Code.

(c) If the applicant or anyone who will drive the motor vehicle has been convicted more than once for the offenses listed under Paragraph (a) and once under Paragraph (b) above, he shall not be considered to be in good faith entitled to insurance under this Plan.

[fol. 286] Sec. 23. Disabilities

No risk will be eligible if the applicant or anyone who normally or usually drives the automobile or anyone who

drives it with the express or implied consent of the applicant has a major mental or physical disability.

Sec. 24. Illegal Registration

A risk shall not be considered to be in good faith entitled to insurance nor shall coverage be extended in any case if the applicant has during a period of twelve months immediately preceding the date of application intentionally registered a motor vehicle in the State illegally.

Sec. 25. Failure to Pay Prior Automobile Insurance Premiums

A risk shall not be considered to be in good faith entitled to insurance nor shall coverage be extended in any case in which the applicant or anyone who normally or usually drives the automobile or anyone who drives it with the express or implied consent of the applicant has failed to meet all obligations to pay automobile bodily injury and property damage liability insurance premiums contracted during the previous twelve months.

Sec. 26. Re-Certification of Operator's License of Applicant

If the designated insurer, after investigation of the experience, physical or other conditions of any risk applying for coverage under this Plan, believes that reasonable doubt exists as to whether such applicant should continue to be licensed to operate a motor vehicle in this State, such insurer to whom the risk has been assigned may request the Director of Motor Vehicles to re-certify the ability of such applicant to continue to hold an operator's license; such applicant will not be eligible under this Plan until and unless the applicant is re-certified by the Director of Motor Vehicles as competent to hold and use an operator's license, either by a driving test or such other means as the Director may require.

[fol. 287]

Article III—Rates

Sec. 30.

All risks assigned under this Plan shall be subject to the rules, rates, minimum premiums and classifications in force, and to the Rating Plans applicable thereto, which the

insurers to which risks may be assigned use in the State, plus an additional charge amounting to a multiplier of 1.10 for public-passenger-carrying vehicles, such as taxicabs, public livery, private livery, buses, etc., and for long haul trucking risks, and for all others a multiplier of 1.15.

Sec. 31.

If the experience, physical or other conditions of any risk applying for coverage under this Plan are such as to indicate that the hazard of the risk is greater than that contemplated by the rates or minimum premiums normally applicable to the risk, the insurer may charge such rates and minimum premiums as are commensurate with the greater hazard of the risk, subject to approval by the Governing Committee and review, if sought, by the Insurance Commissioner. Any special increase in rate in accordance with this section shall be deemed to include the additional charge of 1.10 for public passenger-carrying vehicles and long haul trucking risks, or 1.15 for all others.

Article IV—Applications for Assignment

Sec. 40. Application for Assignment Form

The application for insurance under this Plan must be signed in every case by the applicant, but may be submitted by the applicant or his producer. It must be accompanied by an investigation fee of Five Dollars, in the form of a certified check or money order, which shall be paid to the Plan and credited against the premium if the risk is assigned and accepted, and the applicant pays the balance of the premium in accordance with this Plan; if not, the fee is not returnable. The application shall be filed on a prescribed form accompanied by the original letters from [fol. 288] at least THREE insurers refusing such coverage. Such application shall require:

(a) Complete underwriting and character information; and complete financial information where the coverage sought is to be written on a basis requiring final adjustment of the premium subsequent to the expiration of the policy.

(b) A statement by the applicant that he will maintain a complete record of his financial transactions

in such form and manner as the carrying insurer may reasonably require and that such record will be available at all times to the insurer at a designated place. This statement shall be required only where the insurance is to be written on a basis requiring final adjustment of the premium after expiration of the policy.

(c) That the applicant agrees to comply with all reasonable recommendations of the insurer made with the view to reducing the hazards of the risk.

(d) That the applicant agrees upon being notified to remit within 15 days to the insurer a certified check, money order, or bank draft payable to the designated insurer for the balance of the full premium for his policy.

(e) Certification of the application by an affidavit to be sworn to before a Notary Public.

Sec. 41. Application for Coverage

A risk which desires insurance and has been unable to obtain it for itself, and thus becomes an applicant under this Plan, shall proceed in accordance with this Article and the applicant may designate a licensed producer of record to act on his behalf in soliciting coverage from insurers as required by Section 20, and this Article, but in either case the applicant must sign the application form. [fol. 289] The fully completed application, in duplicate, accompanied by the insurers' original letters refusing such coverage, shall then be filed with the Manager of the Plan.

Sec. 42. Designation of Insurer

Upon receipt of an application for insurance properly completed, signed and attested, the Manager shall designate an insurer to whom the risk will be assigned for a period of twelve months and so advise the producer of record.

Sec. 43. Notification to Applicant

Within fifteen days after receipt of notice of designation from the Manager, the designated insurer shall notify the applicant either

(a) That, if the balance of the full premium as stated within such notice is received within 15 days or within such further reasonable period as the insurer may

agree to, it will issue a policy to become effective 12:01 a.m. of the day following the day on which such premium as stated in such notice is actually received by the insurer, or

(b) That it will not issue a policy for the reason that the applicant is not in good faith entitled to insurance under this Plan, in which event the reasons supporting such action shall be furnished the Manager.

A copy of each such notice shall be furnished the Manager and the producer of record.

When full premium payment has been received by the designated insurer and such insurer has actually issued a policy, the insurer shall immediately notify the Manager that it has actually issued a policy, giving the Manager the policy number, amount of premium collected and the policy effective date.

[fol. 290] Sec. 50. Cancellations

(a) If after the issuance of a policy it develops that the applicant is not or ceases to be in good faith entitled to insurance or has failed to comply with reasonable safety requirements, or has violated any of the terms or conditions upon the basis of which the insurance was issued, or if unusual or unexpected circumstances develop, or if the insurance was obtained through fraud or misrepresentation, the insurer which issued the policy shall have the right to cancel the insurance in accordance with the conditions of the policy, but in all such cases the reasons supporting such action shall be filed with the Manager ten days prior to the effective date of cancellation.

If default occurs in the payment of premium upon any policy subject to interim adjustment, such policy shall automatically be subject to cancellation in accordance with the required notice as provided in the policy.

A copy of each such cancellation notice shall be furnished to the producer of record.

(b) If for any reason an assigned risk is canceled, the risk shall not be eligible for further consideration until the Manager is fully satisfied that the risk is in good faith entitled to insurance under the Plan.

Article VI

Sec. 60. Expirations and Renewals

(a) Any assigned risk which is dissatisfied with the designated insurer may upon reasonable notice request re-assignment upon expiration. Re-assignment shall be at the option of the Committee.

(b) Every insurer insuring a risk under the Plan shall notify the Manager and the applicant with copy [fol. 291] to the producer of record at least FORTY-FIVE days prior to the expiration date whether the company will

1. Write the renewal of the business voluntarily for its own account at the rates and classifications normally applicable to risks not subject to the Plan; or

2. Accept the renewal assignment of the risk under the Plan, or

3. Refuse the renewal assignment of the risk, giving reasons therefor; in which case the reasons supporting such action shall be furnished the Manager.

(c) If any insurer other than the one designated under the Plan wishes to carry the risk voluntarily at the rates and classifications normally applicable, such insurer may take over the coverage at expiration; or under the same conditions may take over the coverage at any time subject to agreement by the designated insurer.

Article VII

Sec. 70. Right of Appeal

Any applicant under the Plan or subscriber to the Plan who has a grievance respecting the operations of the Plan, may appeal in the first instance to the Committee (provided that, if an insurer represented on the Committee is a party to the controversy, the other members of the Committee shall designate another insurer of the same type to replace such insurer for the purpose of hearing the appeal), which shall review all evidence and render a decision. If a party in interest is dissatisfied with the

decision of the Committee, he may appeal to the Insurance Commissioner of the State, whose decision shall be final.

[fol. 292] Article VIII—Administration

Sec. 80. Costs of Administration

The reasonable costs of administering the Plan for each calendar year shall be determined periodically and apportioned to all subscribing insurers in such proportion as their net direct automobile bodily injury premium writings in the State bear to the total net direct automobile bodily injury premium writings of all subscribing insurers in the State during the preceding calendar year.

Sec. 81. Rules of Procedure—Forms and Supplies

Additional copies of the Plan, the application form and supplementary rules of procedure have been printed and may be obtained at cost upon requisition to the Manager or to the Purchasing Division of the National Bureau of Casualty and Surety Underwriters, 60 John Street, New York.

Every insurer should order its required supply of these items and furnish its branch offices and policy-writing agencies with an adequate stock of the forms. Application forms should be available to any applicant or producer of record upon request so as to minimize any delay in granting of coverage under the Plan to qualified applicants.

Sec. 82. Administration of Plan—Application for Coverage

The fully completed application, in duplicate, accompanied by the insurers' original letters refusing such coverage, shall then be filed with the Manager of the Plan, addressed to

The Manager
California Automobile Assigned Risk Plan
315 Montgomery Street, San Francisco

Sec. 83. Distribution and Assignment of Risks

The Manager shall distribute the risks which are eligible for coverage under the Plan, as far as practicable, to insurers in proportion to their respective net direct auto-

[fol. 293] mobile bodily injury premium writings—with due regard to exclusions under reinsurance agreements, treaties or contracts filed in writing with the Manager, and with due regard to the facilities of the insurer for servicing the risk. For purposes of assignment to all insurers, the Manager shall use the latest available net direct automobile bodily injury premium writings in California of calendar years ending December 31, for assignment of risks during the twelve months commencing on the next succeeding April 1st. Net premiums shall be gross written premiums prior to reinsurance assumed, less only return premiums and premiums on policies not taken.

Sec. 84.

Upon assignment of a risk to an insurer the Manager will forward to such designated insurer the original copy of the application form accompanied by the insurers' original letters refusing such coverage.

Sec. 85. Records

The Manager will keep adequate records of the risks assigned and as of December 31, 1942, and semi-annually thereafter, the Manager will prepare a report of the assignments made and any cancellation of such assignments, by insurer, for distribution to subscribers to the Plan.

Sec. 86. Calculation of Premium and Commission

The designated carrier will determine the premium to be charged in accordance with Article III of the Plan. Unless other special arrangements have been registered with the Committee, the designated insurer will pay the producer of record for his services in accordance with the following limits:

- (a) For public passenger carrying vehicles and for long haul trucking risks, 5% of the total premium [fol. 294] charged and collected from the applicant as commission to a licensed producer designated by the assured, and 2½% of the total premium charged and collected from the applicant as field supervision allowance to the company to which the risk has been assigned or to its licensed agent.

(b) For all others, 10% of the total premium charged and collected from the applicant as commission to a licensed producer designated by the assured, and 2½% of the total premium charged and collected from the applicant as field supervision allowance to the company to which the risk has been assigned or to its licensed agent.

Any special increase in rate in accordance with Article III shall be deemed to include the surcharge permitted under the Plan to allow for payment of commissions.

Note: Commissions and field supervision allowances referred to above are to be computed on the basis of the total premium charged and collected from the applicant.

Sec. 87. Notification to Applicant or Producer of Record

If the insurer agrees to accept the assignment, it shall proceed in accordance with Section 43 of the Plan and shall duly notify the applicant through the producer of record or notify the applicant direct with a copy of such notification to the producer of record. A copy of such notification shall also be sent to the Manager, including therein a statement of the total amounts which applicant is required to pay for the coverage.

[fol. 295] Sec. 88. Premium Payments

Payments by the applicant shall be made as directed by the designated insurer.

Sec. 89. Notification to Manager of Issuance of Policy

When premium payment has been received and the designated insurer has actually issued a policy, the insurer shall immediately notify the Manager that it has actually issued a policy, and shall furnish the Manager with the policy number, effective date of such policy, and the amount of premium collected.

If at the end of the fifteen-day period or such further reasonable period as the designated insurer may allow the applicant, coverage is not accepted by the applicant, the designated insurer shall notify the Manager of this fact.

(These notifications to the Manager of the Plan are necessary in order that he, as Administrator of the Plan, may

have an accurate record of the risks actually assigned to insurers for which such insurers have actually issued policies, and will thus be able to distribute future assigned risks in equitable proportion to insurers' respective premium volumes.)

[fol. 296] IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN
FRANCISCO

No. 374555

Department Number Two .

Honorable Edward P. Murphy, Judge

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE
BUREAU, Petitioner,

VS.

WALLACE K. DOWNEY, Insurance Commissioner of the State
of California, Respondent

Reporter's Transcript of Hearing

APPEARANCES

For the Petitioner: Messrs. Brobeck, Phleger & Harrison, by Moses Lasky, Esq., 111 Sutter Street, San Francisco, California.

For the Respondent: Hon. Fred N. Howser, Attorney General, by T. A. Westphal, Jr., Deputy and Harold Haas, Deputy, 600 State Building, San Francisco, California.

[fol. 297] Wednesday, June 30, 1948—10:30 o'clock A. M.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Lasky: This is a petition for writ of mandate brought here under the provisions of the Government Code as a mode of judicial review of an order of the Insurance Commissioner, Mr. Downey. Mr. Downey, after hearing has suspended the right of the petitioner California State Automobile Association Inter-Insurance Bureau to engage in the business of writing automobile insurance in this State. The basis of his action turns upon a statute which

was enacted by the legislature last year called the "assigned risk law". In broad substance, that law prescribes that the Insurance Commissioner may promulgate a plan whereby the various insurers are compelled, whether they want to or not, to issue automobile insurance to people who are unable to get it otherwise, people whose risks are so bad that insurance companies refuse to issue them insurance. The statute prescribed that after such plan was promulgated it was the legal duty of every insurer in the State to agree to abide by it and it provided that for failure to subscribe the Commissioner, after hearing could suspend.

Our client, the California State Automobile Association, refused to subscribe because it took the position that that statute was unconstitutional both under the State and Federal Constitutions for three reasons; first it was in violation of due process to compel the company to enter contracts against its will by insuring people it did not desire to [fol. 298], insure; second, as an unlawful delegation of power to the Insurance Commissioner since it prescribed no intelligent standard to promulgate the plan; and third, we contend the plan was in violation of the statute itself even though the statute were to be construed to be constitutional.

The Insurance Commissioner suspended our right to do business and the matter has been brought here. We came before the Presiding Judge and he issued a stay order setting aside the suspension, which is in effect until your Honor has in due course passed upon the matter.

Under the Government Code, the entire record of the proceedings below have been brought before this Court and filed by the respondent as required by law. We also have the contention that certain evidence which was offered below before the Commissioner was improperly excluded. In that respect, I would like to call attention to the provisions of Section 1094.5 of the Code of Civil Procedure:

"Where the Court finds there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in Subdivision E of this Section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the Court is

authorized by law to exercise its independent judgment on the evidence, the Court may admit such evidence [fol. 299] at the hearing on the writ without remanding the case."

Counsel for the Commissioner and I have discussed the matter and I think the understanding is we have agreed that after your Honor has considered the matter and read the briefs which are on file, if you conclude the evidence was improperly excluded you may deem it is properly before you at this time.

Is that correct, Mr. Haas?

Mr. Haas: I would say this: That the offers of evidence were in the form of certain tabulations—statements. We have stipulated that we will not question the authenticity of those tabulations if offered here, but we are reserving our objection to relevancy. I believe that is the extent of the stipulation.

Mr. Lasky: Well, I had a witness on the stand from the Association who testified to a summary from the tabulations he had at that time.

Mr. Haas: Which summary was that?

Mr. Lasky: That was his statement of the loss ratio of the petitioner.

Mr. Haas: I think that we will have to stand on the record.

Mr. Lasky: Then, in that event, if your Honor decides that the evidence should have been admitted below, it will be necessary to return it below and have it admitted, because there is no procedure here for introducing evidence [fol. 300] at this time. We are here on the record.

The Court: All right. Let's go ahead now.

Mr. Lasky: The only matter in the petition that was denied was an allegation that California State Automobile Association had a membership of over 100,000. That was denied for lack of information and belief. I have shown counsel certain statistics on that,—and you are prepared to stipulate that the actual membership of the Association is 189,000 members?

Mr. Haas: That's correct. I would call your Honor's attention to the fact that this is the California State Automobile Association, and not the Inter-Insurance Bureau, the petitioner here.

Mr. Lasky: Yes. Now, with that, I have no new evidence to offer, and I am prepared now to proceed to argue the case. It has been fully briefed, but I think it ought to be argued orally. If your Honor would tell me how much time—

The Court: You may have all the time you want, but don't simply read your brief to me.

Mr. Lasky: I should state the relationship between these parties. The California State Automobile Association was organized in the year 1907. In the year 1914 it created the petitioner, California State Automobile Association Inter-Insurance Bureau. That is what is known as a reciprocal or inter-insurance exchange in this State and what it really is is a group of people entering into insurance [fol. 301] contracts with each other. It is not a legal entity but consists of all those who are insured, each one of which insures all others. They operate through a common attorney in fact. They do not pay premiums but pay a deposit and at the end of the year enough is deducted to cover all losses. Since its organization it has been a fundamental rule of the organization that it would only insure those people who were members of the California State Automobile Association and that is how it has operated ever since it was organized. This statute prescribes that it must insure anybody who is assigned to it by the Assigned Risk Plan promulgated by the Commissioner. We say that violates the due process clause of the Federal Constitution as well as the State Constitution. It not only compels petitioner to enter contracts against its will but compels it to enter into bad contracts. The evidence shows—and I won't go into it—that any risk which comes through the Assigned Risk Plan does so because it is so poor in character that no insurance company will voluntarily accept it.

Now, as your Honor knows, it is a fundamental rule, subject to exceptions in certain cases such as public utilities, that every man has a right to refuse to enter a contract with any one for any reason or for no reason. That has been announced in a case of insurance recently in this State, the case of K. C. Working Chemical Co. vs. Eureka Security Insurance Co., in 82 A. C. A. The Court there said that an insurance company is not bound to accept an [fol. 302] application or proposal for insurance but may reject it for any reason or arbitrarily. And cited in sup-

port of that proposition is the Arizona Frost case where the Arizona court had before it just this kind of a statute and it said it was unconstitutional under the due process clause.

Now, counsel for the Commissioner has contended that insurance is a business affected with a public interest, and, of course, I concede insurance is subject to regulation, so much so it is legitimate to regulate the rates which insurance companies may charge, but to go beyond that and say a person must enter a contract against his will and accept bad risks goes further than the courts permit.

[fol. 303] Mr. Lasky: In the discussion this morning on the constitutionality of this statute with respect to due process, perhaps I did not emphasize the aspects of it I desired to. We do, of course, claim the statute is unconstitutional in requiring an insurer to cover anybody it does not desire to insure, but the point with respect to our petitioner is that it compels us to insure others than members of the California Automobile Association. In other words, our organization was a cooperative organized for the purpose of insuring members of the association and no others, an in cases referring to cooperatives, discussed fully in the brief, that element of the right to confine operations to your own members is dwelt upon.

[fol. 304] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 305] IN THE DISTRICT COURT OF APPEAL OF THE STATE
OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT,
DIVISION ONE

1 Civil No. 14,078

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE
BUREAU, Appellant,

vs.

WALLACE K. DOWNEY, Insurance Commissioner of the State
of California, Respondent

OPINION

The Insurance Commissioner of California suspended the right of the California State Automobile Association Inter-Insurance Bureau to transact the automobile liability in-

insurance business in this state because of the refusal of the Bureau to subscribe to or participate in the California Automobile Assigned Risk Plan. (Cal. Admin. Code, Title 10, §§ 2400-2498.) This Plan had been approved and promulgated by the Commissioner under the claimed authority of the Assigned Risk Law. (Stats. of 1947, Chap. 1205, p. 2714; §§ 11620-11627 of the Insurance Code.) Pursuant to section 11523 of the Government Code as amended in 1947, the Bureau sought, by mandate, to compel the Commissioner to restore its right to do business. From a judgment denying the petition for this writ the Bureau appeals.

There are no substantial controverted factual issues presented on this appeal. The basic contentions of appellant are that the Assigned Risk Law is unconstitutional and that, as applied to appellant, the Assigned Risk Plan is invalid.

The issues presented are of vital importance to those engaged in the automobile insurance industry, and to various segments of the public. This interest is partially [fol. 306] reflected in the fact that amici curiae briefs have been filed, all in support of respondent, by 81 companies writing automobile insurance in California, another by an attorney representing the California Association of Insurance Agents, the Insurance Brokers Society of Southern California, and The Society of Insurance Brokers, while still another on behalf of The National Association for the Advancement of Colored People. These briefs, as well as the excellent briefs prepared by counsel for both litigants, and the two oral arguments, have been of great assistance to the court in deciding the somewhat complex questions presented.

Background of Appellant

The California State Automobile Association was organized and incorporated in 1907 as a motor club for the purpose of advancing the interests of the motoring public. By the year 1914, many of its members requested that the Association care for their automobile insurance needs. Many members felt that the rates charged by the private companies were high and unsatisfactory. The Association, in the year mentioned, created appellant, the California State Automobile Association Inter-Insurance Bureau, in order to offer to its membership a plan of automobile insurance at a lower cost than the then prevailing rates.

The Bureau is somewhat difficult to classify. It is a reciprocal or inter-insurance exchange. It is open only to members of the Association. Its executive body, called the "Insurance Board" is elected by the Board of Directors of the Association, and is composed of the same number of members as the board of directors of the Association. Participation by the members of the Association is voluntary. Each member desiring to join the Bureau executes a power of attorney to the same agent, authorizing him or it to enter into agreements of insurance. The members act as insurers [fol. 307] of one another. No premiums, as such, are paid. Each member makes an annual deposit which is credited to him. The deposit fund is used to pay losses and expenses, for which purposes a proportionate amount is deducted from the deposit of each member. The operations of such organizations are regulated by sections 1280 to 1530 of the Insurance Code.

In many ways such an organization resembles a mutual insurance corporation. Its basic differences from such an organization are in mechanics of operation and in legal theory, rather than in substance. Appellant asserts that it is not a legal entity, which is undoubtedly technically correct. Obviously, it provides for a form of cooperative insurance by means of a joint venture or limited partnership. For various purposes, the law has treated such an organization as if it were a separate entity. Thus, persons, natural or corporate, holding the powers of attorney must procure a certificate of authority from the Insurance Commissioner (§ 1350, Ins. Code); its finances are minutely regulated, (§§ 1370-1375, Ins. Code); it can sue or be sued in its own name (§ 1450, Ins. Code); a member or subscriber cannot be sued on any obligation contained in the power of attorney until a final judgment against the inter-insurance bureau has been unsatisfied for 30 days (§ 1451, Ins. Code); all moneys received from members and not returned are subject to the gross premium tax placed on insurance companies (§ 1530, Ins. Code; *Inds Indem. Exch. v. State Bd. Equalization*, 26 Cal. 2d 772); and for purposes of liquidation it is an entity (*Mitchell v. Pac. Greyhound Lines*, 33 Cal. App. 2d 53).

History of the Assigned Risk Law

The tremendous increase in the number of motor vehicles in recent years, the great number of automobile accidents, [fol. 308] the enormous loss to the persons injured where the person at fault is uninsured and unable to respond in damages, and the natural desire of the automobile insurance companies to keep their losses down by limiting their policies to selected risks, have created many problems which the legislatures of many states have studied and attempted to solve. Nearly every state provides for the licensing of drivers, and many for their careful examination to weed out the unfit. Some states have provided for compulsory insurance as a prerequisite to the issuance of a driver's license, while others have provided a form of limited compulsory insurance by requiring certain persons to give proof of financial responsibility before they may secure a license to drive.

The California Legislature has given much thought to this problem. As early as 1929, it adopted a statute providing for the suspension of the license to operate a motor vehicle of certain persons for various reasons, including the failure of a driver or owner to pay a final judgment of \$100 or more for personal or property damage arising out of the operation of a motor vehicle. (Stats. of 1929, Chap. 258, § 4, p. 560.) This portion of the statute has been several times amended and has been codified in the Vehicle Code as section 410. The entire act is now found in sections 410 to 420.9 of the Vehicle Code. The act provides that one against whom such a judgment has been secured can lift the suspension only by paying the judgment and establishing his ability to pay claims that may arise from future accidents. Such ability to pay may be established by proof that the person involved is now insured, or he may post a surety bond, or he may deposit \$11,000 in cash with the State Treasurer.

Another step in the same direction was taken in 1935. In that year, the City Carriers' Act was adopted. (Stats. of [fol. 309] 1935, Chap. 312, p. 1057.) That act applies to highway carriers operating in any city of the state, and requires such operators to secure liability insurance, or give other evidence of financial responsibility, as a condition prerequisite to securing a permit to operate trucks for hire.

These statutes had one effect that was perhaps not foreseen by the Legislature, and that was that many competent drivers, many of whom depended for a living upon driving a motor vehicle, were prevented from operating motor vehicles because of their inability to secure an insurance policy or to give other proof of their financial responsibility. This was particularly true of a large number of small truck operators to whom insurance companies were reluctant to issue policies and who could not make the \$15,000 cash deposit required. Many of these operators were refused insurance not because they were bad drivers, or not because they had a bad accident history or criminal record, but simply because many insurance companies believed that small truck operators, as a class, were a bad risk in view of the unfavorable loss ratios caused by the increasing accident rate, large jury verdicts, etc. Other large groups of drivers who apparently had difficulty in securing or were unable to secure insurance were violators of traffic laws, members of minority groups, particularly the colored drivers, persons with minor physical disabilities, the young and the old drivers, and, of course, those who had bad accident records.

Such a situation created much hardship and many inequities, and various solutions were offered to the Legislature, one of which was that the State go into the insurance business and assume these and other risks. This was a solution opposed and feared by the insurance companies. Faced with these various pressures, in 1942, all insurance companies, handling automobile insurance in California, including appellant, adopted a voluntary "assigned risk" [fol. 310] plan, which provided a method for insuring some, but not all, of the groups that were unable, otherwise, to secure insurance. This plan was approved by the State Insurance Department and became effective July 1, 1942. Under this plan, approved applicants for insurance were allocated to the subscribing insurers in proportion to the amount of automobile insurance written by each subscribing insurer the preceding year. In 1943, the Legislature facilitated the operation of the plan and recognized it by enacting sections 1110 to 1113 of the Insurance Code.

This voluntary plan alleviated, in some degree, the situation created by the statutes of 1929 and 1935, but it was only a partial palliative. It was strictly limited to per-

sons required to procure and maintain insurance in order to operate their automobiles or trucks. Other persons who for one reason or another were deemed greater than ordinary risks by insurers were not covered by the voluntary plan.

Appellant, as already mentioned, was a subscriber to the voluntary plan, but all during the time it participated it adhered, strictly, to its policy of insuring only members of the California State Automobile Association, some of whom were members of the restricted groups. Late in 1946 or early in 1947, appellant withdrew from the plan. This immediately imperilled the soundness of the voluntary plan. One of the largest insurers in the state was refusing to take a share of the assigned risks, thus increasing the proportionate number other insurers were expected to take. The other insurers were reluctant to continue the voluntary plan under such circumstances. In this emergency the Legislature, then in session, promptly acted. It passed, as an emergency measure, the Compulsory Assigned Risk Law (Stats. of 1947, Chap. 39, p. 525) which became effective February 17, 1947. It provided that, after consultation [fol. 311] with insurers writing automobile insurance, the Commissioner shall approve "a reasonable plan for the equitable apportionment among such insurers of applicants for automobile . . . insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods." Upon the adoption of such a plan "all such insurers shall subscribe thereto and shall participate therein." The Legislature declared the act to be an urgency measure "necessary for the immediate preservation of the public peace, health and safety," and declared the nature of the emergency in the following language:

"Under provisions of the Vehicle Code, certain persons who have been involved in motor vehicle law violations are required to file insurance policies or other evidence of financial responsibility with the State in order to continue lawfully to operate motor vehicles upon the public highways of the State.

"Because insurers are naturally reluctant to grant insurance to such persons, it has been necessary to devise a plan for allocating such risks upon an equitable plan to the insurers engaged in the business. Such a plan, dependent

upon the voluntary consent of all insurers, has been in effect for a number of years, but has recently ceased to operate because of the withdrawal of one of the subscribing insurers.

"Unless this act takes immediate effect, many persons who are insured under the former plan will be deprived of their insurance and those seeking to obtain such insurance will be unable to do so. Both classes will be deprived of the opportunity to operate motor vehicles upon the public highways, with a consequent loss in earning power in many cases and serious hardship in others; or in the alternative may continue to operate such vehicles in violation of the law, with a resultant increased burden on law enforcement [fol. 312] agencies and a probable increase in disrespect for law."

Present Compulsory Assigned Risk Law.

The above statute was amended by the same legislature that had passed the emergency act (Stats. of 1947, Chap. 1205, p. 2714), by amending section 11620 of the Insurance Code and enacting sections 11621-11627 of that code. It is these statutes, and the plan adopted pursuant thereto, that are attacked by appellant in this proceeding. Section 11620, as then amended, provides in part as follows: "The commissioner, after a public hearing, shall approve or issue a reasonable plan for the equitable apportionment, among insurers admitted to transact liability insurance, of those applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods. The commissioner may approve or issue reasonable amendments to such plan if he first holds a public hearing to determine whether the amendments are in keeping with the intent and purpose of this section. All such insurers shall subscribe to the plan and its amendments and, subject to Section 11621, participate therein."

Provision is then made in the section for a statutory notice of hearings on the proposed plan. Section 11621, after providing that assignments of risks shall not be made in certain instances not here involved, then states: "In so far as possible, assignments under the plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber." Section 11622 provides the amount of coverage required, while section 11623 authorizes

the subscribing insurers to "form their own organization which shall, subject to review by the Insurance Commissioner, administer and operate the plan." Section 11624 [fol. 313] provides that the plan adopted pursuant to the statute shall contain:

"(a) Standards for determining eligibility of applicants for insurance, and in establishing such standards the following may be taken into consideration in respect to the applicant . . .

"(1) His criminal conviction record;

"(2) His record of suspension or revocation of a license to operate an automobile;

"(3) His automobile accident record;

"(4) His age and mental, physical and moral characteristics which pertain to his ability to safely and lawfully operate an automobile;

"(5) The condition or use of the automobile.

"(b) Procedures for making application for insurance, for apportionment of eligible applicants among the subscribing insurers and for appeal to the commissioner by persons who believe themselves aggrieved by the operation of the plan.

"(c) Rules and regulations governing the administration and operation of the plan.

"(d) Provisions showing the basis upon which premium charges shall be made and

"(e) Such other provisions as may be necessary to carry out the purpose of this article."

Section 11625 provides that if any insurer fails to subscribe to the Plan, the Commissioner shall give such company ten days' written notice to subscribe. If the insurer still refuses to participate, the Commissioner "may, after hearing upon notice, suspend the certificate of authority of such insurer to transact liability insurance in this State until such insurer does so subscribe." Section 11626 provides for discipline of subscribers who violate the plan, [fol. 314] while section 11627 provides that the term "insurer" includes "reciprocal or interinsurance exchanges."

At the same session of the Legislature that passed this statute there was also passed the Highway Safety Responsibility Law. (Stats. of 1947, Chap. 1235, p. 2738, adding

§§ 419 to 420.9 to the Vehicle Code.) This law provides for the suspension, regardless of fault, of the license of the operator of any motor vehicle involved in an accident within the state in which injury to any person, or property damage in excess of \$100 results unless the operator is insured or puts up a cash deposit. This law greatly aggravated the need for an assigned risk plan because it tremendously increased the number of persons required to carry insurance or give other evidence of their financial responsibility.

The Assigned Risk Plan.

The Commissioner, acting pursuant to the provisions of the Assigned Risk Law, held a hearing in October of 1947, on an assigned risk plan proposed by the automobile insurers operating in this state. Appellant appeared at that hearing and attacked the constitutionality of the Assigned Risk Law, but also stated that it would give consideration to accepting the plan voluntarily if the proposed plan were modified so as to give recognition to appellant's policy of insuring only members of the California State Automobile Association. This condition was not acceptable to the Commissioner nor to the committee. The plan was adopted without such a provision, and appellant refused to subscribe to it. The Commissioner, acting pursuant to section 11625 of the Insurance Code, suspended appellant's permit to transact automobile liability insurance in California. The appellant sought to review and annul this order of suspension by means of a petition for writ of mandate filed in the Superior Court. That court denied the petition and appellant has appealed. By stipulation of counsel, and by order of this court, the operation of the suspension order was stayed pending the final determination of the case on appeal. (§ 1094.5f, Code of Civ. Proc.)

Provisions of the Challenged Plan.

Before directly discussing the contentions of appellant, reference should be made to the general provisions of the Assigned Risk Plan. The Plan is to be found in the California Administrative Code, Title 10, sections 2400 to 2498.

The Plan is available to all residents of California and to non-residents using automobiles registered in this state.

(§ 2404.) Policies issued under the Plan shall provide a \$5,000-\$10,000 coverage. (§ 2406.) The Plan is to be administered by a committee of five elected by the insurers and representing the various types of insurers doing business in this state. (§§ 2421 and 2421.1). The committee appoints a manager who is to be the administrative executive of the Plan and who makes all assignments of risks. (§ 2422.) Applicants "who are in good faith entitled" to insurance but are unable to procure it through ordinary channels, are eligible. (§ 2430.) The same section provides that an applicant shall be deemed to be in good faith entitled to insurance unless he is within certain specified categories. The excluded categories include those who, within three years prior to their application, have been convicted more than once of any of the following offenses:

- a. Failing to stop and report when involved in an accident.
- b. Manslaughter or negligent homicide resulting from [fol. 316] operation of the vehicle.
- c. Theft or unlawful taking of a vehicle.
- d. Any felony in which an automobile was used.
- e. Driving under the influence of liquor and causing death or bodily injury to another.
- f. Driving while licenses are suspended or revoked.
- g. Permitting unlawful use of driver's license or any other offense under section 338 of the Vehicle Code (§ 2431.1); or within the same three-year period has been convicted more than twice of:

- a. Driving while intoxicated or under the influence of liquor.
- b. Driving in a reckless manner where injury to person or property results.
- c. Driving at excessive rate of speed where injury to person or property results. (§ 2431.)

It is also provided that other persons not "in good faith entitled" to insurance are:

1. Those addicted to use of drugs. (§ 2431.1a.)
2. Those habitually using alcohol to excess. (§ 2431.2a.)
3. Those failing to disclose serious motor accidents or traffic violations in their applications. (§ 2431.3.)

4. Those found to have operated vehicle more than once while license was suspended or revoked. (§ 2431.3a.)
5. Those with defective automobiles who have failed to repair them at the Committee's demand. (§ 2431.4.)
6. Those who failed to pay insurance premiums on automobile insurance during the past year. (§ 2431.5.)
7. Those with a major mental or physical disability. (§ 2431.5a.)
8. If the risk consists of or includes a vehicle carrying [fol. 317] passengers for compensation. (§ 2431.6.)
9. If the risk consists of a vehicle used in transporting explosives, gasoline or other highly inflammable or explosive materials. (§ 2431.6a.)
10. Those under 18 who cannot show hardship. (§ 2431.7a.)
11. Those whose driving would, in the opinion of the Committee, endanger public safety. The entire history of the applicant may be examined in making such a determination. (§ 2431.8.)

Section 2445.1 provides: "Insofar as possible, assignments shall be consistent with the scope of territorial operations and underwriting policies of each insurer, of which the Manager shall have been notified in writing. Underwriting policy is policy founded on underwriting judgment of the hazards involved. Without in any way limiting or enlarging the meaning of the term 'underwriting policy,' policy excluding from insurance an applicant solely by reason of the fact of his non-membership in an organization is not underwriting policy. Underwriting policy excluding from insurance applicants solely by reason of facts or circumstances not sufficient to render them not in good faith entitled, under this Plan, to insurance is inconsistent with the purposes of this Plan and of the statute under which it is approved and issued."

The only other section now necessary to mention is section 2461 which provides that: "If the experience, physical or other condition of any risk assigned under the Plan is such as makes the hazard of the risk greater than that contemplated by . . . [the normal rates] . . . the insurer . . . may charge such rates and minimum premiums as are commensurate with the greater hazard of the risk, subject to the approval of the Committee."

[fol. 318] *Constitutional Arguments of Appellant.*

Appellant directs its main arguments against sections 11620 and 11627 of the Insurance Code, contending that, for various reasons, those sections deny to it due process of law in violation of the Fourteenth Amendment to the United States Constitution. The arguments can be summarized as follows:

It is urged that the insurance business is not a public calling; that while the United States Supreme Court, in *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, upheld the regulation of charges made by such companies, that decision is predicated upon the assumption that insurance companies cannot be compelled to make contracts against their will; that the present statute compels appellant to enter into contracts against its will and thus treats appellant, a private business, as if it were a public utility; that although a business may be impressed with a public interest so as to be subject to state regulation, the right thus to regulate does not include the power of the state to compel businesses that have not dedicated their property to the public to enter into contracts against their will. (*Allen v. Railroad Commission*, 179 Cal. 68, 88, is cited in support of this contention.)

Appellant next argues that, even in the public utility field, one who serves only a limited group cannot be compelled to serve others. In this connection reliance is placed on a line of cases which hold that a private carrier cannot be compelled to accept business, but may refuse service on the basis of convenience. (*Forsyth v. San Joaquin Light etc. Corp.*, 208 Cal. 397; *Morel v. Railroad Commission*, 11 Cal. 2d 488, and *Stephenson v. Binford*, 287 U. S. 251, are typical of the cases cited to support this argument.) It is then argued that, even if the insurance business were subject to [fol. 319] the same degree of control as a public utility, appellant cannot be compelled to accept non-member risks because appellant has heretofore restricted its operations to contracting only with members of the California State Automobile Association. Thus, it is contended, appellant is not a public insurer, and cannot be compelled to serve others. The power to regulate does not include the power to compel a company to furnish service. Such cases as *Associated etc. Co. v. Railroad Commission*, 176 Cal. 518; *Allen v. Railroad Commission*, 179 Cal. 68; *Frost v. Railroad Commission*, 197

Cal. 230, reversed in 271 U. S. 583; *Morel v. Railroad Commission*, 11 Cal. 2d 488; *Cudahy Packing Co. v. Johnson*, 12 Cal. 2d 583; *Trask v. Moore*, 24 Cal. 2d 365; *Ocean Park etc. Corp. v. Santa Monica*, 40 Cal. App. 2d 76, and others (see, also, note 175 A. L. R. 1333), are relied upon as establishing the principle that a statute which subjects a contract carrier to the burdens of a public utility violates the due process clause. This principle is peculiarly applicable to cooperatives, according to appellant, it being contended that a cooperative cannot be regulated like a public utility. (*Frost v. Railroad Commission*, 271 U. S. 583; *Hissem v. Guran* (Ohio), 146 N. E. 808; *State v. Nelson* (Utah), 238 Pac. 237; *Garkane Power Co. v. Public Service Commission* (Utah), 100 Pac. 2d 571, are cited in support of this proposition.)

It is next urged that the fact that a license is required does not give the State the power to deny to appellant the privilege of doing business or exacting an improper price for its approval. (*Frost v. Railroad Commission*, *supra*; *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536; *Union Pacific R. R. Corp. v. Commission*, 248 U. S. 67, are supported as establishing this proposition.)

Finally, it is argued that the Plan is not essential to the Financial Responsibility Law; that it forces the members of the Association to pay for injuries caused by non-member drivers who are bad risks, and that, in effect, the Plan constitutes an attack on a non-profit cooperative by its competitors. For these and other reasons appellant urges that the Plan violates its constitutional rights.

Discussion of the Constitutional Arguments.

Most of the cases cited by appellant deal only with the application of general rules to the particular facts there involved, and are applicable here, if at all, only indirectly by way of analogy. Appellant does, however, cite one case that contains language that directly upholds its position. That case is *Employer's Liability Assur. Corporation v. Frost*, 62 Pac. 2d 320, decided in 1936, by the Arizona Supreme Court. (An annotation on the case is to be found in 107 A. L. R. 1421, and a supplementary annotation in 123 A. L. R. 139.) The *Frost* case involved a state statute which compelled insurance companies writing workmen's compensation insurance to accept all applications, and to waive

the right to investigate and inform itself of the risks and hazards incident thereto. The court, among other things, held that the statute violated the freedom to contract right guaranteed by the Fourteenth Amendment. The court pointed out that (p. 324): "The courts have gone far in upholding the right of the state to regulate and control insurance business within its boundaries, but we have found no case where the facts, as here, call for a decision upon the power of the Legislature to make it mandatory upon an insurance company qualifying under its laws to carry a certain kind of insurance to insure all risks of that kind for which application may be made to it which are not prohibited by law." This case is contrary to the decisions of the Supreme Court of Massachusetts, and of the Supreme Court of Texas, decisions which had been rendered when the Arizona court decided its case in 1936, but which are not referred to by it. (See *In re Opinion of the Justices* (Mass.—1925), 251 Mass. 569, 147 N. E. 681; *Harris v. [fol. 321] Traders' & General Ins. Co.* (Texas—1935), 82 S. W. 2d 750; *Texas Employers' Inc. Ass'n v. U. S. Torpedo Co.* (Texas—1928), 8 S. W. 2d 266, aff. in 1930 in 26 S. W. 2d 1057; see, also, the later Massachusetts case of *Factory Mut. Liability Ins. Co. v. Justices of S. Court* (1938), 16 N. E. 2d 38, and the later, 1939, Texas case of *Federal Underwriters Exchange v. Walker*, 134 S. W. 2d 388.) Several of these cases will be discussed later.

The Arizona Supreme Court, as an alternative ground for its decision, pointed out that the Arizona State Compensation Insurance Fund was allowed, but not compelled, to accept insurance from employers. After quoting the pertinent portion of the statute so providing the Court stated (p. 323): "This language is permissive and not mandatory. The provisions of section 1422, however, leave to insurance companies no alternative; they must write all applications. There is no reason, real or apparent, for this provision unless it be that it was put into the law as a deterrent to private insurance companies to enter the field of compensation insurance in competition with the state compensation fund. If that was the motive, the law should have prohibited insurance companies from selling compensation insurance in Arizona and not undertaken to compel them to insure all applications regardless of the hazards." This ground of the decision is undoubtedly sound; the freedom of contract argument is not.

The difficulty with appellant's argument, and with the Arizona case, is that they disregard or treat cavalierly, most of the relatively recent constitutional law cases dealing with the subject of the police power, and rely upon the earlier cases containing a very restricted viewpoint of the State's police power. Thus, many of the principles discussed in *Frost v. Railroad Commission*, 271 U. S. 583, and *Michigan Commission v. Duke*, 266 U. S. 570, relied upon by appellant, which cases held that a contract carrier could not be subjected to the burdens imposed on a public utility, were drastically modified as early as 1932 in *Stephenson v. Binford*, 287 U. S. 251. That case, and those following it, have held that if the business is affected with a public interest (and the insurance business is—*German Alliance Ins. Co. v. Lewis*, 233 U. S. 389), the validity of the regulation depends primarily upon whether the challenged legislation is reasonably appropriate to the ends sought to be attained.

Starting in 1934, with the case of *Nebbia v. New York*, 291 U. S. 502, there has been a marked development and advance in the attitude of the United States Supreme Court towards regulatory legislation. That case held that the State of New York could, by statute, fix the minimum and maximum sales prices of milk in that state. *Nebbia* argued that such a statute violated the due process and equal protection clauses of the Fourteenth Amendment. Some of the comments of Mr. Justice Roberts, the author of the majority opinion, are peculiarly applicable to the present case. Thus, at p. 523 it is stated: "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

And at p. 525: "The Fifth Amendment, . . . and the Fourteenth, . . . do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been

held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

And at p. 527: "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned . . . And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency."

Nebbia argued that the milk industry was not a public utility, and that the public power over rates could be validly exercised only over business affected with a public interest—that is, according to Nebbia, only over public utilities. The court conceded that the milk industry was not a public utility, but held that it was a business affected with a public interest and therefore subject to regulation. Quoting from *Munn v. Illinois*, 94 U. S. 113, the Court (p. 533) held that: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." On the same page this thought was expressed: "Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression." Still referring to the *Munn* case, the [fol. 324] Court continued the discussion as follows (p. 533):

"In the further discussion of the principle it is said that when one devotes his property to a use, 'in which the public has an interest,' he in effect 'grants to the public an interest in that use' and must submit to be controlled for the common good. The conclusion is that if *Munn* and *Scott* wished to avoid having their business regulated they should not have embarked their property in an industry which is subject to regulation in the public interest.

"The true interpretation of the court's language [in *Munn v. Illinois*] is claimed to be that only property voluntarily devoted to a known public use is subject to regulation

as to rates. But obviously Munn and Scott had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue."

In further discussing this subject, the Court directly discussed the insurance business. It pointed out that, because of the great need for insurance protection, and because competing insurers had agreed upon a fixed schedule of rates, the court had upheld, in *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, a statute fixing the premium rates on fire insurance. Still referring, by analogy, to the field of insurance, the Court, at p. 535, stated: "Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. . . . Insurance agents' compensation [fol. 325] may be regulated, though their contracts are private, because the business of insurance is considered one properly subject to public control."

And at p. 536 it stated: "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. . . . The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. . . . These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a

state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule [fol. 326] for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co. v. United States*, 193 U. S. 197, 337-8. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."

The *Nebbia* case has been frequently cited with approval, and its doctrine of state power over business and industry steadily expanded. Whenever a state determines, in good faith, that a practice of an industry is injurious to the public, the state may control the practice even where the legislation directly affects the internal affairs of a business or industry, as long as the legislation is neither arbitrary nor discriminatory. A few citations and examples will serve to illustrate the extent of this control.

In *Lincoln Federal Labor Union v. Northwestern I. & M. Co.*, 335 U. S. 525, 536, the Court stated: "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases [208 U. S. 161]. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. [Citing cases.] Under this constitutional doctrine the due process clause is [fol. 327] no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when

they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."

In *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, the court upheld the constitutionality of the state of Washington's minimum wage law for women and minors. The court reiterated the principle that freedom of contract is a qualified and not an absolute right, and again stated that the test of unconstitutionality was whether the legislation was arbitrary or capricious, "that is all we have to decide." (P. 399.)

—In *Osborn v. Ozlin*, 310 U. S. 53, the court upheld the constitutionality of a Virginia statute which provided that insurance companies doing a casualty and risk business within the state must handle such insurance "through regularly constituted and registered resident agents or agencies of such companies," and that such resident agents should receive the usual commissions and could not share more than one-half of a commission with a non-resident licensed broker. Speaking of the power which the state has over the regulation of insurance companies, the Court said (p. 65): "It is not our province to measure the social advantage to Virginia of regulating the conduct of insurance companies within her borders insofar as it affects Virginia risks. Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates, . . . it may regulate the compensation of agents, . . . it may curtail drastically the area of free contract. . . . States have controlled the expenses of insurance companies. They have also promoted insurance [fol. 328] through savings banks. . . . In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, . . . or might take 'the whole business of banking under its control.' . . . If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards. . . . All these are questions of policy not for us to judge. For it can never be emphasized too

much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty. The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control."

A case peculiarly applicable here is *Hoopston Co. v. Cullen*, 318 U. S. 313. There the issue before the court was whether appellant reciprocal insurance associations (insurers against fire and other related risks) whose attorneys in fact were located in Illinois, could constitutionally be made subject to the laws of New York as a condition of insuring property in that state. After holding that New York had the power to regulate these companies, the court considered the question of whether the particular regulations objected to by the appellants were in violation of the due process clause. Particularly objected to by the appellants was a prohibition against making new agreements with subscribers who did not have assets in excess of ten thousand dollars. The Court said (p. 321): "The appellants earnestly insist that theirs is a successful system of cooperative insurance which gives complete security with substantial economy to their members, and that their New York subscribers may lose the benefits of this form of [fol. 329] insurance by reason of the reciprocals' inability to comply with the requirements of the New York law. That the reciprocals save for their members from 25 to 50 per cent of the cost of ordinary commercial insurance and that the members are well satisfied with the system they have created is not controverted by counsel for the state of New York. However persuasive such arguments might be if addressed to the state legislature, they present no constitutional barrier which prevents New York from enforcing these regulations if it chooses." (See, also, *Insurance Co. v. Glidden Co.*, 284 U. S. 151.)

In California, it has been held that: "It is settled law of California that the business of insurance is one affected with a public interest." (*Caminetti v. State Mut. Life Ins. Co.*, 52 Cal. App. 2d 321, 324.) In that case the appellate court affirmed an order of the lower court refusing to vacate an order appointing the Commissioner as conservator for a mutual insurance company where the evidence showed that the payment of a \$1,000 monthly salary to the executive vice-president was hazardous to the company.

Many other cases could be cited, but these are sufficient to illustrate the trend of decisions. The above cases deal with general principles, and not with the specific problem here involved. But we are not without authority—state authority it is true—on the precise question. Massachusetts enacted a compulsory automobile insurance law requiring all drivers to be licensed, and all licensed drivers to give security for civil liability growing out of the operation of motor vehicles. One form of approved security was a liability insurance policy. The statute, in detail, provided for the form of such policies by requiring them to contain certain provisions and prohibited others, and also regulated premiums. The statute also provided that if any applicant was refused a policy, or if his policy was canceled, he could apply to a statutory board of appeal which was authorized to determine if such refusal or cancellation was "reasonable," and whether the applicant was a "proper person" to whom a policy should be issued. If the board of appeal decided in favor of the applicant, the insurance company was required to issue a policy, and, upon refusal, its license to do business was to be suspended. In an advisory opinion to the Legislature—Opinion of the Justices, 251 Mass. 569—the Supreme Judicial Court of Massachusetts held that the statute, in all respects, was constitutional. After holding that the business of automobile liability insurance affected the public interest, and after upholding the compulsory provisions of the act including the provisions relating to the content of the policies and the regulation of charges, etc., the Court upheld the provision requiring insurance companies to issue policies to applicants found reasonably entitled to insurance by the board of appeals. At p. 613 the Court discussed this problem as follows: "The several features of the proposed bill set forth in the eighth question as provisos constitute serious limitations upon customary methods of conducting the insurance business. The question whether a particular risk shall be assumed by an insurer or surety is an important factor in the conduct of such business. . . . Character, physical capacity, sight, hearing, financial responsibility, record of past conduct, personal habits, nature and extent of business and general reputation are among the elements of essential significance in determining whether motor vehicle liability bonding or insurance for any particular applicant shall be undertaken. To subject the deter-

mination of such a vital question by an insurer or surety to review is a great interference with freedom of contract. The right to freedom of contract is secured as a general [fol. 331] rule by the constitutions of the Commonwealth and Nation; but there are exceptions where legislative interference with that right is permissible. We are of opinion that the proposed bill in this aspect does not transcend legislative power. The right of the citizen to register a motor vehicle whereby he may travel upon the ways is made strictly conditional upon his depositing cash or securities or upon procuring a motor vehicle liability policy or bond. This, too, is a great interference with freedom of action. The refusal by corporations to issue such policy or sign such bond may drive one out of business or seriously impair his convenience. Where such paramount interests are at stake with sole reference to the use of public ways provided wholly at the expense of the government, there is constitutional basis for legislative regulation to the end that no injustice may be done. Unwarranted discrimination may arise against certain applicants. Instances may arise of honest difference of opinion whether a policy or bond ought to be issued at all, or whether, after issuance, it ought to be cancelled. To provide an impartial administrative tribunal to settle such controversies, although going to the verge of power, cannot in our opinion be pronounced in excess of the authority conferred by the Constitution upon the General Court.

In *Factory Mut. Liability Ins. Co. v. Justices of S. Court* (Mass.), 16 N. E. 2d 38, in a contested case, the highest court of Massachusetts upheld an order of the board of appeal ordering the insurance company to issue a policy to an applicant who had been refused a policy. There is some language in the opinion particularly applicable here. At p. 40 the Court stated:

"When our Legislature enacted the compulsory motor vehicle insurance law, by which all persons registering [fol. 332] motor vehicles are required to provide security for the payment of claims for damages arising from their operation on the public ways, it foresaw the necessity for providing at the same time a procedure under which individuals could compel companies engaging in the business to insure them in the absence of sound reasons for refusal. . . .

" . . . Nor can a company limit the power of the board and the court to determine whether a refusal is proper and reasonable under all the circumstances by insistence upon answers deemed by it to be satisfactory to such questions as it may see fit to include in an application blank. *And it is plain that no company attempting to engage in this business can take the position that it will insure only pleasure vehicles or limit its operations to that part of the field in which there is the least risk and the most profit.* The compulsory law contemplates, and its successful operation requires, that as to their obligations to issue policies all companies alike should abide by the orders of the board or of the court." (Italics added.)

A similar statute has been upheld in Texas. (*Harris v. Traders' & General Ins. Co.*, 82 S.W. 2d 750; *Texas Employers' Ins. Ass'n. v. U. S. Torpedo Co.*, 8 S.W. 2d 266, aff. in 26 S.W. 2d 1057; *Federal Underwriters Exchange v. Walker*, 134 S.W. 2d 388.)

No further reference to the authorities need be made on this phase of the case. The insurance business is one affected with a public interest, and subject to regulation. As long as the statute has a reasonable relation to a proper legislative purpose, and is neither arbitrary nor discriminatory, it is a valid enactment and cannot be successfully challenged under the due process clause of the federal Constitution. That a valid legislative purpose here existed is too clear to require extended discussion. For the protection of persons using the highways, the Legislature determined that certain drivers of motor vehicles had to be insured, or give security. Many in these affected groups could not secure a policy or give security. Their means of livelihood, in many cases, was jeopardized. Their right to use the highways was greatly limited. Some means whereby applicants in good faith entitled to insurance could get it, had to be provided. This could be done either by the State going into the insurance business, or by an assigned risk plan affecting all insurers. The Legislature determined to adopt the latter alternative. The Legislature also determined that such a plan could not operate successfully unless all companies writing liability policies were required to take their share of assigned risks. Otherwise, as pointed out by the Massachusetts court, *supra*, one company could select its risks, and thus gain what the Legislature has

determined to be an unfair advantage over its competitors. Unless appellant is required to assume its share of the assigned risks on penalty of losing its license, it will gain an unfair advantage over its competitors. This is a phase of the insurance business clearly subject to regulation. No company can be compelled to assume a risk. But if it refuses to accept an assigned risk, its right to do business in this state may be terminated. The cases heretofore cited clearly establish that the due process clause is no impediment to such a statute. The State's police powers clearly encompass such regulation.

The argument that such legislation compels appellant to enter its contracts of insurance against its will, and thus impairs appellant's constitutional right to freedom of contract, and destroys one of the essential elements of a contract—consent—has been fully answered in the cases cited above. The State has said that insurance companies that [fol. 334] enter the liability field cannot limit their activities to the most profitable type of business, but must share proportionately the less profitable policies. This infringement on the freedom of contract is justifiable, for reasons already stated. The Plan has a reasonable relation to a valid legislative purpose. It is not arbitrary, capricious, or discriminatory. There is therefore no violation of the due process clause.

Appellant, in the briefs and oral arguments, has laid much stress on the contention that, as applied to appellant, the statute compels it to render a service beyond the scope of its claimed dedication to the public service. The argument is fallacious. It is based on the theory that heretofore it has limited its policies to members of the California State Automobile Association, a select group. If appellant has "dedicated" its business to the public service, it has dedicated it to the writing of automobile liability insurance. The extent of its "dedication" cannot be measured by its past customs or practices, but must be measured by the extent of its powers under the law. While appellant has heretofore only insured a select group, that does not mean that appellant has "dedicated" its business to that group. Under the law (Ins. Code, § 108) this company has the legal right to write automobile liability insurance on a statewide basis and for all applicants. That is the real extent of its "dedication".

Nor does the plan give the competitors of appellant any unfair advantage—in fact, to exclude appellant from the plan would be to give it a most unfair advantage over other companies. Appellant writes an appreciable proportion of the automobile liability insurance written in this state. To permit it to select its risks, and to deny that right to its competitors would be most unfair. The right of the [fol. 335] State to regulate a mutual or reciprocal insurance company, and to compel such companies to abide by reasonable regulations applicable to all, is too clear to require further discussion. That is not discrimination—it is applying the rule of uniformity.

Delegation of Legislative Authority to the Commissioner.

The second major contention of appellant is that the statute is invalid because it fails to provide an adequate yardstick for the guidance of the Commissioner, and thus unlawfully delegates to him legislative powers. There can be no doubt that it is the law that a valid statute cannot delegate unlimited powers to an administrative officer and that, to be valid, the statute must “provide an adequate yardstick for the guidance of the executive or administrative body or officer empowered to execute the law.” (Blatz Brewing Co. v. Collins, 69 Cal. App. 2d 639, 645, quoting from 11 Am. Jur. 955, § 240; see, also, Am. Distilling Co. v. St. Bd. of Equalization, 55 Cal. App. 2d 799; also see 24 Cal. L. Rev. 184; 23 Cal. L. Rev. 435; 8 So. Cal. L. Rev. 226, 255; 29 Cal. L. Rev. 110, 120.) It is this principle appellant seeks to here invoke.

The theory of appellant is that, under the statute, the Commissioner is free to determine, at his arbitrary will, what types of applicants insurers will be compelled to insure, and what types they may refuse to insure. It will be remembered that § 11620 of the Insurance Code requires the Commissioner to “approve or issue a reasonable plan for the equitable apportionment . . . of those applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods.” Section 11621 requires assignments under the plan “In so [fol. 336] far as possible” to be “consistent with the scope of territorial operations and underwriting policies of each subscriber.” Section 11624 requires the plan to contain

"Standards for determining eligibility of applicants for insurance," and provides that the Commissioner in establishing such standards "may" take into consideration five specified factors.

It is the basis of appellant's argument on this point that these statutes limit the Commissioner in making assignments only to those "in good faith entitled," and that such words, in fact and in law, place no limitation at all upon the powers of the Commissioner. It is claimed that section 11624 constitutes no limitation on the Commissioner because its provisions are permissive and not mandatory. Such a statute provides no standard at all on the power of the Commissioner, and constitutes an unlawful delegation of legislative power, according to appellant. Reliance is placed on such cases as *Panama Refining Co. v. Ryan*, 293 U. S. 388; *Schechter Corp. v. United States*, 295 U. S. 495; *State v. Hines* (Kan.), 182 Pac. 2d 865.

The rule that the statute must provide a yardstick to define the powers of the executive or administrative officer is easy to state but rather hard to apply. Probably the best that can be done is to state that the yardstick must be as definite as the exigencies of the particular problem permit.

The cases cited by appellant set out a pretty rigid standard. Very broad language can be found in them, but such language must be read in connection with the particular problem under discussion. There are several cases decided by the United States Supreme Court, more recent than those cited by appellant, where the problem is exhaustively discussed and where the principles to be applied are set [fol. 337] forth at length. One such case is *Lichter v. United States*, 334 U. S. 742, where the court upheld the constitutionality of the Re-negotiation Act. Under attack on the ground of unconstitutional delegation of legislative powers to administrative officers, was the section of the statute which provided that cabinet secretaries could re-negotiate contracts under which "excessive profits" had been or would be realized, and further allowed the Secretary to recover "excessive profits" paid to contractors under the re-negotiated contracts. No definition of "excessive profits" was contained in the statute. The court held that the phrase "excessive profits" constituted a sufficient yardstick in view of its context, and because of the administrative practices later incorporated into the act, and the nature

of the war power there being employed. Certainly, such a standard is far less definite than the one here employed. In discussing standards upheld in other cases the Court stated (p. 786):

“The following, somewhat comparable, legislative specifications are among those which have been held to state a sufficiently definite standard for administrative action:

“‘Just and reasonable’ rates for sales of natural gas, . . . ‘public interest, convenience, or necessity’ in establishing rules and regulations under the Federal Communications Act, . . . ; prices yielding a ‘fair return’ or the ‘fair value’ of property, . . . ; ‘unfair methods of competition’ distinct from offenses defined under the common law, . . . ; ‘just and reasonable’ rates for the services of commission men, . . . and ‘fair and reasonable’ rent for premises, with final determination in the courts, . . .”

Another leading case is *Yakus v. United States*, 321 U. S. 414, in which the court held that there was no unconstitutional delegation of power by Congress to the Price Administrator in the Emergency Price Control Act of 1942. Section 1(a) described the general purpose of the Act. By section 2(a), the Administrator was authorized to promulgate regulations fixing prices of commodities which “in his judgment will be generally fair and equitable and will effectuate the purposes of this Act” when in his judgment, their prices “have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act.” The section also provided that “so far as practicable . . . the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 . . . and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, . . .”

The statute was upheld as providing a sufficient standard. There is much stated in the opinion that is here applicable. At p. 423 the Court stated:

“Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The bound-

aries of the field of the Administrator's permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent wartime inflation and its enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act [fol. 339] specified in §1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in §2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.

“The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established.” After distinguishing the *Schechter* case the Court stated (p. 424):

“The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Con-

[fol. 340] -gress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.

"Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."

At page 426 appears the following pertinent illustrations:

"The authority to fix prices only when prices have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act to prevent inflation is no broader than the authority to fix maximum prices when deemed necessary to protect consumers against unreasonably high prices, sustained in *Sunshine Anthracite Coal Co. v. Adkins*, [fol. 341] *supra*, or the authority to take possession of and operate telegraph lines whenever deemed necessary for the national security or defense, upheld in *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163; or the authority to suspend tariff provisions upon findings that the duties imposed by a foreign state are 'reciprocally unequal and unreasonable,' held valid in *Field v. Clark*, *supra*." Other powers mentioned by the court as within the constitutional

limitation are set forth on p. 427 as follows: “. . . the power to approve consolidations in the ‘public interest,’ . . .; or the power to regulate radio stations engaged in chain broadcasting ‘as public interest, convenience or necessity requires,’ . . .; or the power to prohibit ‘unfair methods of competition’ not defined or forbidden by the common law, *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304; . . .; or the similar direction that in adjusting tariffs to meet differences in costs of production the President ‘take into consideration’ ‘in so far as he finds it practicable’ a variety of economic matters, sustained in *Hampton & Co. v. United States*, *supra*; or the similar authority, in making classifications within an industry, to consider various named and unnamed ‘relevant factors’ and determine the respective weights attributable to each, held valid in *Opp Cotton Mills v. Administrator*, *supra*.”

The United States Supreme Court has also commented on this problem in *American Power Co. v. S. E. C.*, 329 U. S. 90. The problem there involved and its solution are disclosed in the following quotation (p. 104):

“Section 11(b)(2) itself provides that the Commission shall act so as to ensure that the corporate structure or continued existence of any company in a particular holding company system does not ‘unduly or unnecessarily complicate the structure’ or ‘unfairly or inequitably distribute [fol. 342] voting power among security holders.’” The objection that this was an insufficient standard was rejected.

At p. 105 the Court stated: “. . . These standards are certainly no less definite in nature than those speaking in other contexts in terms of ‘public interest,’ ‘just and reasonable rates,’ ‘unfair methods of competition’ or ‘relevant factors.’ The approval which this Court has given in the past to those standards thus compels the sanctioning of the ones in issue. . . .

“The judicial approval accorded these ‘broad’ standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems. . . . The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate

specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."

Enenough has been quoted to illustrate how similar problems have been handled by the highest court. It is clear that the fact that the Commissioner has some discretion, is no valid constitutional objection to the statute. It is also clear that the Assigned Risk Law does not have to be considered in a vacuum. Other states *in pari materia* may, of course, be considered. The original Assigned Risk Law with its urgency clause, may be looked to in order to ascertain the legislative purpose. So too, we may properly consider the various statutes requiring insurance or security from certain automobile drivers. The background of the present statute, the problem it was designed to meet, the voluntary plan, its breakdown, all serve to give meaning and substance to the provisions of the statute under consideration. Thus, when section 11620 of the Insurance Code declares that it is the policy of the law to allow the Commissioner to issue a plan for the equitable apportionment of applicants in good faith entitled to insurance, the statute does not stand alone but must be considered in connection with its object and its background. If the statute was to be effective, great discretion had to be left to the Commissioner to meet the various and complex problems with which he was to be presented. Rigid standards were not reasonably practicable. While the statute must furnish the administrator with a yardstick, it need not furnish a micrometer. The policy of the statute is clear. In our opinion, the yardstick furnished complies with constitutional requirements.

Does the Plan Violate the Statute?

The next contention of appellant is that, if it be assumed that the statute is valid, the Plan actually adopted violates the provisions of the statute and is therefore void.

The appellant attacks the Plan in several minor and one major respect. The first minor attack is against various provisions of the Plan on the ground that certain distinctions made therein are arbitrary or discriminatory. None of these alleged discriminations operates against appellant. It is elementary that only a member of the class discriminated against can attack the constitutionality of a plan on the charge of unconstitutional discrimination.

[fol. 344] Another minor objection to the Plan is the claim that it overlooks consideration of the record of applicants with respect to suspension or revocation of drivers' licenses. (Ins. Code, § 11624(a) (2).) However, appellant has apparently overlooked sections 2431.8 and 2431.8a of the Plan, which provide that the application may be refused if the accident and conviction records are such that his operation of an automobile would endanger public safety, or if, on the basis of a thorough investigation of the applicant's record, reasonable doubt exists as to whether the applicant should be permitted to continue driving.

The main attack against the Plan is based on the last sentence of section 11621 of the Insurance Code which reads as follows: "In so far as possible, assignments under the plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber."

The Plan provides (§ 2445.1) that "In so far as possible, assignments shall be consistent with the scope of territorial operations and underwriting policies of each insurer, of which the Manager shall have been notified in writing. Underwriting policy is policy founded on underwriting judgment of the hazards involved. Without in any way limiting or enlarging the meaning of the term 'underwriting policy,' policy excluding from insurance an applicant solely by reason of the fact of his non-membership in an organization is not underwriting policy. Underwriting policy excluding from insurance applicants solely by reason of facts or circumstances not sufficient to render them not in good faith entitled, under this Plan, to insurance is inconsistent with the purposes of this Plan and of the statute under which it is approved and issued." Appellant argues at length that this provision of the Plan is invalid, indefinite and irrational. The argument, omitting certain technical [fol. 345] attacks on the provision, none of which is sound,

amounts to this—Section 11621 of the Insurance Code requires that any plan adopted shall “In so far as possible” be consistent with the underwriting policies of the insurer. The policy of insuring only members of the California State Automobile Association is an underwriting policy of appellant. The Plan (§ 2445.1) declares this not to be an “underwriting policy.” The Plan therefore violates the statute.

The obvious answer to appellant’s argument is that all “underwriting policies” of an insurer do not have to be given recognition by the Plan. Section 11621 of the Insurance Code does not compel the Commissioner to embody all such underwriting policies into the Plan. The language is “In so far as possible” such underwriting policies shall be considered in making assignments. If it be assumed that a policy or practice of writing insurance only for members of the Association is an “underwriting policy,” such policy is directly opposed to the purpose, intent and spirit of the statute. Certainly, section 11621 does not require the Commissioner to embody into the Plan a policy of a particular insurer that is violative of the statute. It is apparent that if membership in arbitrarily selected groups were to be recognized as a proper base of underwriting policy, the way would be open whereby any company could evade legitimate assignments on the ground that the particular applicant was not a member of the selected group. Thus, the entire purpose of the statute would be defeated.

It is apparent that the Commissioner cannot have a plan providing for “equitable apportionment” of risks among all insurers unless he ~~has~~ the power to assign to appellant applicants who are non-members of the Association. Section 2445.1a of the Plan provides that when a member of the Association applies for insurance under the Plan, the [fol. 346] member shall preferably be assigned to appellant. However, appellant cannot refuse an applicant merely because he is not a member of the Association. This would seem to be as “equitable” an apportionment as is possible without destroying the effect of the statute.

Thus, whether it be considered that the Commissioner gave no consideration to appellant’s policy of writing insurance only for members of the Association, or that he gave

such consideration "In so far as possible," the Plan does not violate the statute.

The judgment appealed from is affirmed.

Peters, P.J.

We concur:

Bray, J. Schottky, J. Pro Tem.

[fol. 347] IN DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISIONS ONE AND TWO

MINUTE ENTRY OF JUDGMENT—April 10, 1950

Division One

14078

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU

v.

DOWNNEY, ETC.

The judgment appealed from is affirmed. Peters, P. J.
We concur: Bray, J., Schottky, J. pro tem.

[fol. 348] FIRST APPELLATE DISTRICT, SAN FRANCISCO COUNTY

Honorable Edward P. Murphy, Judge

Division One

Civil No. 14078

[Title omitted]

DOCKET ENTRIES

1950

April 25. Filed petition for rehearing.

May 19. Petition for hearing filed in Supreme Court.

[fol. 349] IN THE DISTRICT COURT OF APPEAL OF THE STATE
OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—May 10, 1950

By THE COURT:

The Petition for a Rehearing filed in the above entitled
cause is hereby denied.

Dated May 10, 1950.

Peters, P. J.

[fol. 350] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK
CALIFORNIA STATE AUTOMOBILE ASS'N INTER-INSURANCE
BUREAU

v.

Downey, as Insurance Com'r., etc.

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT
COURT OF APPEAL—Filed June 8, 1950

Appellant's petition for hearing Denied.

Dated ———, ———.

Gibson, Chief Justice.

Clerk's Certificate to foregoing paper omitted in print-
ing.

[fol. 351] [File endorsement omitted]

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT, DIVISION ONE

[Title omitted]

PETITION FOR APPEAL—Filed August 5, 1950

Considering itself aggrieved by the final decree and judgment of this Court entered on April 10, 1950, with respect to which this Court on May 10, 1950 denied a timely petition for rehearing and the Supreme Court of the State of California on June 8, 1950 denied a timely petition for hearing, petitioner and appellant California State Automobile Association Inter-Insurance Bureau hereby prays that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal [fol. 352] bond to be given by said petitioner and appellant, and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

Dated: August 3, 1950.

Respectfully submitted, Brobeck, Phleger & Harrison, Maurice E. Harrison, Moses Lasky, Attorneys
for Petitioner and Appellant.

[fol. 353] [File endorsement omitted]

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT, DIVISION ONE

[Title omitted]

ORDER ALLOWING APPEAL—August 3, 1950

California State Automobile Association Inter-Insurance Bureau, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause, entered on April 10, 1950, with respect to which this Court on

May 10, 1950 denied a timely petition for rehearing and the Supreme Court of the State of California on June 8, 1950 denied a timely petition for hearing, and from each and every part thereof, and having presented its assignment of errors and prayer for reversal and its statement as to the [fols. 354-436] jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of \$250, with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that, pursuant to the "Stipulation for Stay of Issuance of Remittitur" filed herein on June 8, 1950 and the "Order Staying Remittitur" made and filed on June 8, 1950, the issuance of the remittitur shall be and is stayed until termination of the proceedings in the Supreme Court of the United States.

It is further ordered that the Clerk of this Court prepare, certify and transmit to the Supreme Court of the United States the record herein as designated or stipulated by the parties and that, so far as possible, the Clerk transmit the original transcripts and papers in the record, in lieu of copies.

It is further ordered that citation shall issue in accordance with law.

Dated: August 3, 1950.

Raymond E. Peters, Presiding Justice, District Court
of Appeal, First Appellate District.

[fol. 437] [File endorsement omitted]

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT, DIVISION ONE

[Title omitted]

ASSIGNMENT OF ERRORS—Filed August 5, 1950

California State Automobile Association Inter-Insurance Bureau, petitioner and appellant in the above-entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of errors on which it will rely in its prosecution of its appeal from the final judgment of the District Court of Appeal of the State of California, First Appellate District, entered April 10, 1950.

The said District Court of Appeal erred:

1. In holding that the California Assigned Risk Law (Cal. Stats. of 1947, Ch. 39, p. 525, as amended, Stats. of [fol. 438] 1947, Ch. 1205, p. 2714; Sec. 11620-11627, Cal. Insurance Code), insofar as it compels, or empowers the Insurance Commissioner of the State of California to compel, petitioner and appellant and its members, against their will, to insure non-members of California State Automobile Association, does not violate and is not repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2. In holding that the California Assigned Risk Plan (Cal. Administrative Code, Title 10, Sec. 2400-2498) promulgated by the said Insurance Commissioner under authority of the said Assigned Risk Law, insofar as it compels petitioner and appellant and its members, against their will, to insure non-members of California State Automobile Association, does not violate and is not repugnant to the due process clause of said Fourteenth Amendment.

3. In holding that the said Insurance Commissioner could and did validly and without violating said Fourteenth Amendment suspend the certificate of authority of petitioner and appellant to transact automobile liability insurance in California for failure to subscribe to said Assigned Risk Plan.

4. In failing to order, adjudge and decree that the decision of said Insurance Commissioner, made March 19, [fol. 439] 1948, suspending petitioner and appellant's cer-

tificate of authority to transact automobile liability insurance in California, until it should subscribe to said Assigned Risk Plan, is invalid and void and should be annulled and set aside, as violating the said Fourteenth Amendment, and affirming the judgment of the Superior Court of the State of California in and for the City and County of San Francisco denying said petitioner and appellant's petition for writ of mandate to annul and set aside said decision of the Insurance Commissioner.

Wherefore, petitioner and appellant, California State Automobile Association Inter-Insurance Bureau, prays that the judgment and decision of the District Court of Appeal of the State of California, First Appellate District, be reversed, and for such other and further relief as the court may deem fit and proper.

Brobeck, Phleger & Harrison, Maurice E. Harrison,
Moses Lasky, Attorneys for Petitioner and Appellant.

[fols. 440-442] Citation in usual form, filed Aug. 7, 1950, omitted in printing.

[fols. 443-472] Cost Bond on Appeal for \$250.00 approved and filed Aug. 5, 1950, omitted in printing.

[fol. 473] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 474] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1950

[Title omitted]

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND
DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—
Filed September 25, 1950

Appellant adopts for its statement of points upon which it intends to rely in its appeal in this Court the points contained in its Assignment of Errors heretofore filed.

Appellant designates the entire record herein for printing by the Clerk of this Court, except that the following may be omitted.

1. Pages 82, 83, 84.
2. Page 97, line 23 through page 100, line 22.

3. Page 103, line 3 through page 108, line 14.
4. Page 111, lines 7 to 16.
5. Page 118, line 5 through page 125, line 20.
6. Page 126, line 19 through line 18, page 128.
- [fol. 475] 7. Page 131, line 18 through line 24, page 132.
8. Page 133, line 10 through page 134, line 19.
9. Page 135, line 24 through page 138, line 15.
10. Page 138, line 26 through page 145, line 6.
11. Page 147, beginning with the word "again" in line 23 through page 152, line 11.
12. Page 153, line 5 through line 13, page 155.
13. Page 157, line 4 through page 158, line 16.
14. Page 162, line 13 through page 164, line 6.
15. Page 165, line 25 through page 169, line 15.
16. Page 171, line 20 through page 172.
17. Page 178, line 15 through page 183.
18. Page 186, line 25 through page 200.
19. Page 202.
20. Pages 210 to 226, inclusive.
21. On page 228, all after the words "Description of Automobile" appearing in boldface in the middle of the page, to but not including the words "In Witness Whereof", etc.
22. On page 239, all after the words appearing in boldface in the middle of the page reading "Description and Facts with respect to the Purchase of the Automobile", to but not including the words "In Witness Whereof", etc.
23. On page 250, all after the words "Declarations by Applicant" appearing in bold face, to but not including the words "In Witness Whereof", etc.
24. On page 262, all after the words "Declaration by Applicant", to but not including the words "In Witness Whereof", etc.
25. Pages 263 to 279, inclusive.
- [fol. 476] 26. Pages 355 to 436, inclusive.
27. Pages 446 to 466, inclusive.
28. Pages 468 to 471, inclusive.

Maurice E. Harrison, Moses Lasky, Counsel for
Appellant.

[fol. 477] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1950

[Title omitted]

APPELLEE'S DESIGNATION OF ADDITIONAL AND MATERIAL PARTS
OF THE RECORD TO BE PRINTED—Filed September 29, 1950

Appellee considers the following parts of the record, omitted from appellant's designation, to be material, and appellant therefore designates the following parts of the record to be printed:

- (1) Page 118, line 5, through page 125, line 20.
- (2) Page 126, line 19, through page 128, line 18.
- (3) Page 133, line 10, through page 134, line 49.
- (4) Page 135, line 24, through page 138, line 15.
- (5) Page 138, line 26, through page 145, line 6.
- (6) Page 147, beginning with the word "again" in line 23, through page 152, line 11.
- (7) Page 153, line 5, through page 155, line 13.
- (8) Page 157, line 4, through page 158, line 16.
- [fol. 478] (9) Page 162, line 13, through page 164, line 6.
- (10) Page 165, line 25, through page 169, line 15.
- (11) Page 171, line 20, through page 172.
- (12) Page 178, line 15, through page 183.
- (13) Pages 263 to 279, inclusive.

Dated: September 25, 1950.

Fred N. Howser, Attorney General of the State of
California; T. A. Westphal, Jr., Deputy; Harold
B. Haas, Deputy, Attorneys for Appellee.

[fol. 479] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1950

No. 310

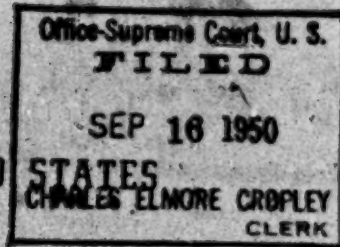
ORDER NOTING PROBABLE JURISDICTION—November 13, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: Enter: Moses Lasky. File No. 54816. California, District Court of Appeal, First Appellate District. Term No. 310. California State Automobile Association Inter-Insurance Bureau, Appellant, vs. Wallace K. Downey, Insurance Commissioner of the State of California. Filed September-16, 1950. Term No. 310 O. T. 1950.

(1432)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 310

**CALIFORNIA STATE AUTOMOBILE ASSOCIATION
INTER-INSURANCE BUREAU,**

Appellant,

vs.

**WALLACE K. DOWNEY, INSURANCE COMMISSIONER OF
THE STATE OF CALIFORNIA**

**APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST APPELLATE
DISTRICT, STATE OF CALIFORNIA.**

STATEMENT AS TO JURISDICTION

**BROBEUK, PHLEGGER & HARRISON,
MAURICE E. HARRISON,
MOSES LASKY,**

Counsel for Appellant.

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IN THE DISTRICT COURT OF APPEAL, STATE OF
CALIFORNIA, FIRST APPELLATE DISTRICT,
DIVISION ONE

1 Civ. No. 14,078

CALIFORNIA STATE AUTOMOBILE ASSOCIATION
INTER-INSURANCE BUREAU,
Petitioner and Appellant,

vs.

WALLACE K. DOWNEY, INSURANCE COMMISSIONER OF
THE STATE OF CALIFORNIA, *Respondent and Appellee.*

STATEMENT AS TO JURISDICTION

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, petitioner-appellant, California State Automobile Association Inter-Insurance Bureau, submits this statement particularly disclosing the basis on which the Supreme Court has jurisdiction on appeal to review the judgement of the District Court of Appeal of the State of California, First Appellate District, entered in this cause.

Opinion Below

The opinion of the District Court of Appeal is reported, 96 A.C.A. 973,¹ 216 P. 2d 882. A copy is attached hereto as Exhibit A; the paging in A.C.A. is indicated on the face of Exhibit A to facilitate subsequent references in this Statement.

Jurisdiction

The judgment of the District Court of Appeal was entered April 10, 1950. A petition for rehearing was filed April 25 and denied May 10, 1950, and a petition for hearing by the state Supreme Court was filed May 19 and denied June 8, 1950. The District Court of Appeal had jurisdiction to grant a rehearing within 30 days of its decision on petition filed within 15 days (Cal. Constitution, Art. VI, Sec. 4(c); Rules 27(a) and (b) of Rules on Appeal issued by the California Judicial Council under authority of Cal. Civil Code, Sec. 961). The state Supreme Court had jurisdiction to grant a hearing within 60 days of the decision of the District Court of Appeal, on petition filed within 40 days (Cal. Const., Art. VI, Sec. 4(b) and (c); Rule 28 of Rules on Appeal).

A petition for appeal to the Supreme Court of the United States is presented to the District Court of Appeal herewith, on August 3, 1950. The appeal is timely. Title 28 U.S.C. Sec. 2101(e); *Market Street Railway Co. v. Railroad Commission of California*, 324 U. S. 548; *American Railway Express Co. v. Levee*, 263 U. S. 19; *Department of Banking v. Pink*, 317 U. S. 264, 266; *Chicago G.W.R.R. Co. v. Basham*, 249 U. S. 164.

The judgment of the District Court of Appeal is that of the highest court of the state in which a decision could be had. No appeal lies from decisions of District Courts of

¹ 96 Advance California Appellate Reports 973.

Appeal in California to any other state court. Although the state Supreme Court had discretionary power to grant a hearing, it denied a timely petition that it do so (see above). The judgment of the District Court of Appeal is therefore the judgment to be reviewed. *American Railway Express Co. v. Leree*, supra; *Sullivan v. Texas*, 207 U. S. 416.

The suit was one to annul an order of the Insurance Commissioner of California depriving appellant of the right to do business upon the basis of a statute of the State of California, the validity of which was drawn in question by appellant as being repugnant to the Constitution of the United States. The judgment of the District Court of Appeal was in favor of its validity. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28 U.S.C., Section 1257(2).

In addition to the statute, there is involved in a subordinate way a legislative plan promulgated by the Insurance Commissioner of California under authority of the assailed statute. Within the meaning of Title 28, U.S.C., Section 1257(2), this plan is a statute of the state. *Hamilton v. Regents*, 293 U. S. 245, 258; *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 300.

Question Presented

Where a cooperative has set up an inter-insurance exchange or reciprocal by which members may insure each other against automobile accident liability, where the reciprocal has never insured non-members of the cooperative and the practice of insuring only members has constituted the reciprocal's basic policy since its inception years ago and the foundation of its existence, may a State, without violating the due process clause of the Fourteenth Amendment to the United States Constitution, compel it to issue

against its will insurance to non-members of the cooperative and thereby subject each participant in the reciprocal to the damage liabilities of the unwanted risks, particularly where the risks are so hazardous that no insurer will accept them voluntarily? Is a California statute—the Assigned Risk Law—which empowers the State Insurance Commissioner to issue a Plan compelling such a reciprocal to insure non-members, and is the Plan promulgated by the Commissioner under authority of the law, constitutional under the Fourteenth Amendment? And does an order of the Commissioner depriving the reciprocal of the right to do business for refusal to subscribe to and participate in the Plan deprive it and its members of property and liberty without due process? ²

Statute Involved

The statute primarily involved is the *California Assigned Risk Law* (California Stats. of 1947, Ch. 39, p. 525, as amended, Stats. of 1947, Ch. 1205, p. 2714; Sections 11620-11627, California Insurance Code). The material portions are:

Insurance Code, Sec. 11620:

“ . . . The [insurance] commissioner, after a public hearing, shall approve or issue a reasonable plan for the equitable apportionment, among insurers admitted to transact liability insurance, of those applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods. . . . All such insurers shall subscribe to the plan and its amendments and, subject to Section 11621, participate therein.
• • • ”

² All points raised in the Assignment of Errors are also presented. The question presented stated above sets forth the major issue.

Sec. 11621:

"* * * In so far as possible, assignments under the plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber."

Sec. 11625:

"... If an insurer admitted to transact liability insurance fails to subscribe to the plan or to any amendments, thereto the commissioner shall give 10 days' written notice to such insurer to so subscribe. If such insurer fails to comply with such notice, then the commissioner may, after hearing upon notice, suspend the certificate of authority of such insurer to transact liability insurance in this State until such insurer does so subscribe. * * *"

Sec. 11627:

"... In this article, 'insurer' includes reciprocal or interinsurance exchanges."

The other portions of the statute are not relevant and are either adequately summarized or quoted in full in the attached opinion of the District Court of Appeal (at 96 A.C.A. 980, 981).

Secondarily involved is the *California Assigned Risk Plan* issued by the Insurance Commissioner of California under the authority of the Assigned Risk Law (Cal. Administrative Code, Title 10, Sec. 2400-2498).

The material portions are:

Section 2405:

"Subject to the provisions of Section 11621 of the Insurance Code and Section 2449 of this Article, every insurer admitted to transact liability insurance shall participate in this Plan."

Section 2445.1:

"... Without in any way limiting or enlarging the meaning of the term 'underwriting policy', policy

excluding from insurance an applicant solely by reason of the fact of his non-membership in an organization is not underwriting policy."

Section 2445.15:

"In the assignment of a risk when the applicant is a member of a Motor Club * * * preference shall be given to an insurer which confines its underwriting of risks not subject to the Plan to members of such Motor Club * * *. No such insurer may refuse to accept an assignment because the applicant is not a member of such Motor Club."

The remainder of the Plan (which appears in full in the record) is not pertinent; it contains definitions, defines coverage of policies issued under the plan, sets up machinery for administration, states standards for eligibility of applicants desiring insurance under the Plan, prescribes procedure for assignments of risks among insurers, and the like. These provisions are summarized in the attached Opinion of the District Court of Appeal (96 A.C.A. at 982-984).

Statement of the Case

In 1906 California State Automobile Association was formed as a motor club or cooperative of citizens selected for their interest in motoring to advance the interests of the motoring public. Because of high and unsatisfactory automobile insurance rates, the Association, in 1914, created appellant, California State Automobile Association Inter-Insurance Bureau, to provide insurance for its members. Appellant is a reciprocal or "inter-insurance exchange". It is not a legal entity but is permitted to sue in common name (California Ins. Code, Sec. 1450). As described in the Opinion of the court, it is a sort of limited partnership (96 A.C.A. at 976). Each participant or insured gives a power of attorney to a common agent to enter

into mutual agreements of insurance, each prays his share of the losses of others, and each is thus an insurer of all others. It is not organized for profit and does not collect premiums.

As found below,

"Petitioner was formed and organized in the year 1914, solely for the purpose of making insurance available to, and has in practice limited its insurance coverage to 'members of the California State Automobile Association or corporations or firms in which such members are officers or partners,' and has at all times thereafter existed solely for that purpose, and it has continued this practice in force * * *. From its inception it has at all times been and it is petitioner's basic policy that only members in good standing of the California State Automobile Association or corporations or firms in which such members are officers or partners shall be eligible to apply for insurance in petitioner." (Trial Court's finding No. III, Clerk's Transcript, p. 67; and Opinion below, 96 A.C.A. at 976).

Appellant has never insured non-members of the Automobile Association.

In 1947 the State of California enacted the Assigned Risk Law, quoted above, stating in the Law itself that it was enacted "because insurers are naturally reluctant to grant insurance" to certain kinds of bad risks. The heart of it is that it empowered the Insurance Commissioner to issue a plan compelling insurers to enter into contracts of insurance with those whom they did not wish to insure, commanded insurers to subscribe to the plan, and empowered the Commissioner to deprive any insurer who refused to subscribe of the right to do business.

The Assigned Risk Law was enacted at the behest of commercial insurers for profit and was aimed at appellant. As shown by the Opinion, in order to forestall the entry of

the state into the insurance business, the insurance companies in 1942 adopted a voluntary plan to assign among themselves the bad risks which none wished to accept. Appellant temporarily adhered to the voluntary plan, but, even so, strictly followed its policy of insuring only members of the Association. It withdrew from the voluntary plan late in 1946. Thereupon the Assigned Risk Law was enacted in February 1947 to compel appellant to participate "because of the withdrawal" from the voluntary plan, as the Act states. (See Opinion, 96 A.C.A. at 978, 979.)

In October 1947 the Commissioner promulgated the Assigned Risk Plan under authority of the Law. As stated in the Opinion of the District Court of Appeal (96 A.C.A. at 981, 982), at the hearing called by the Commissioner to consider the plan before promulgation,

"appellant appeared * * * and attacked the constitutionality of the Assigned Risk Law, but also stated that it would give consideration to accepting the plan voluntarily if the proposed plan were modified so as to give recognition to appellant's policy of insuring only members of the California State Automobile Association."

"The plan was adopted without such a provision and appellant refused to subscribe to it."

Acting under the Assigned Risk Law, on March 9, 1948, the Insurance Commissioner issued an order suspending appellant's right to transact automobile liability insurance business in California. At the outset of the administrative hearing resulting in this order appellant objected thus:

"The Statute under which this Plan which has just been placed in evidence as Exhibit 2 was issued and approved by the Insurance Commissioner is unconstitutional. In the first place it is unconstitutional be-

cause it deprives persons, and particularly this Respondent and its members, of property without due process of law; and likewise, deprives them of liberty without due process of law. And for that reason it violates the Fourteenth Amendment to the United States Constitution, and particularly, the Due Process Clause thereof.³

Following the procedure prescribed by Section 11523 of the California Government Code for review of orders of administrative agencies, appellant on March 22, 1948 filed in the Superior Court of the State of California, City and County of San Francisco, its petition for writ of mandate to annul the order of the Commissioner. The petition, in paragraph 7, asserted that:

"Said statute [Assigned Risk Law] purports to require insurers to issue insurance and accept risks against their will, and said statute and the aforesaid plan purported to have been issued thereunder, and the decision of the Insurance Commissioner hereinabove referred to [order suspending appellant's right to do business] are and each of them is unconstitutional and void and violates each of the following provisions of the Constitution of the United States: (a) The Fourteenth Amendment, as constituting a law depriving persons, and particularly your petitioner and its members, of property and liberty without due process of law." (Clerk's Transcript, p. 4)

On September 29, 1948, the Superior Court, although finding all facts in appellant's favor, held

"that neither said statute nor said plan is invalid by reason of conflict with any provision of the Constitution of the State of California or of the United States" (Conclusion of Law, No. II, Clerk's Transcript, p. 71)

³ Pp. 6, 7, transcript of the proceedings, part of the record in this cause.

An appeal was taken to the District Court of Appeal. The contentions of appellant on constitutionality are stated in the Opinion of the District Court of Appeal (96 A.C.A. at 984-985). As there stated:

"Appellant directs its main arguments against sections 11620 and 11627 of the Insurance Code, contending that, for various reasons, those sections deny to it due process of law in violation of the Fourteenth Amendment to the United States Constitution"

"* * * It is then argued that, even if the insurance business were subject to the same degree of control as a public utility, appellant cannot be compelled to accept non-member risks because appellant has heretofore restricted its operations to contracting only with members of the California State Automobile Association. Thus, it is contended, appellant is not a public insurer, and cannot be compelled to serve others."

The case was twice argued, and on April 10, 1950 the District Court of Appeal affirmed the judgment. In an eleven page "Discussion of the Constitutional Argument" it held that "There is * * * no violation of the due process clause" (96 A.C.A. at 996).

The Commissioner's "plan" provided that appellant could not refuse to insure risks assigned to it on the ground of non-membership in the Automobile Association. The District Court of Appeal held this to be a correct construction and application of the law (not a federal question), so that the real issue now is whether the law, so construed, violates the due process clause of the Fourteenth Amendment. We believe no separate issue arises as to the Plan, but, if it does, the constitutionality of the Plan is also raised on this appeal, because the District Court of Appeal held that issuance of the Plan was the exercise of a power lawfully delegated by the legislature (also not a federal question), and therefore the Plan is a statute of the state for purposes of review on appeal.

Appellant has continued in business by virtue of successive orders of the courts staying the Commissioner's order of suspension pending final judgment in the cause.

The Question Is Substantial

The question presented is not only substantial but is of utmost public importance. As stated at the outset of the Opinion of the District Court of Appeal (96 A.C.A. at 975):

“The issues presented are of vital importance to those engaged in the automobile insurance industry, and to various segments of the public.”

That Opinion comments on the fact that 81 insurance companies, several associations of insurance agents and brokers, and others filed briefs as amici curiae. The case has been viewed as presenting an important issue in constitutional law.⁴

The statute commands insurers to enter into contracts and to incur liabilities against their will, it destroys the principle, thought to be elementary, that an insurer is not bound to accept an application for insurance, and the risks which it compels insurers to insure are all abnormal and of such a hazard that no insurer will accept them voluntarily.

National Union Fire Insurance Company v. Wanberg, 260 U. S. 71, involved a statute prescribing that if an application for hail insurance was not rejected within 24 hours it would be deemed to have been accepted. Although sustaining the constitutionality of the statute, the Court held that it went to the verge of the Constitution. It said (p. 74):

“We agree that this legislation approaches closely the limit of legislative power, but not that it transcends it.”

⁴ The decision is reviewed nationally in the United States Law Week Volume 18, p. 2503, May 9, 1950.

The reason assigned was "This does not force a contract on the company. It need not accept an application at all or it can make its arrangements to reject one within twenty-four hours." (p. 76.)

Following the *Wanberg* case, it was squarely held in *Employers Liability Assurance Corporation v. Frost*, 48 Ariz. 402, 62 P. 320, that a statute which attempted to impose upon insurers the obligation to issue policies to applicants violated the due process clause of the Fourteenth Amendment. There is contrary dictum in Texas relative to workmen's compensation insurance in cases where the question was not involved, and a contrary advisory opinion of the Massachusetts Supreme Judicial Court, confined, however, to corporate insurers and not reaching the issue raised on this appeal.

The District Court of Appeal in effect concedes that until a few years ago the statute would have been held unconstitutional but argues that with *Nebbia v. New York*, 291 U. S. 502, the Supreme Court drastically expanded the immunity of the police power from the due process clause. Important as was the *Nebbia* decision, neither it nor any subsequent case has gone so far as to support application of the Assigned Risk Law to appellant. What *Nebbia* held was that in order to be subject to *regulation* business need not, as was formerly supposed, be "affected with a public interest". In so doing, it merely subjected all business to the same broad power of regulation to which insurance was already subjected, for insurance had long been understood to be "affected with a public interest". *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389. ↓

Even "regulation", if "it goes too far will be recognized as a taking." (Holmes, J. in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416.) Yet here the statute goes beyond "regulation". To "regulate" is one thing, and to compel one to enter into a contract against his will—

to insure risks he does not wish to insure—is quite another. The *German Alliance* case, *supra*, is often cited (e.g. 11 Am. Jur., p. 1059, Note 7) as showing the difference between the power to regulate and the power to compel service. It has always been deemed elementary (as stated in 43 Am. Jur. 572, Public Utilities and Services, Sec. 2) that

“The fact that a business is affected with a public interest means that it may be regulated for the public good, but does not imply that it is under a duty to serve the public.”

Under the power to regulate as expounded in *Nebbia*, the State may prevent use of property to the detriment of others, prescribe the terms that will enter into a contract if one chooses to make the contract, prohibit injurious practices, impose standards of right conduct, suppress business and industrial conditions offensive to public welfare, curtail the area in which one may contract. But none of this comprehends power to compel one to contract. A cooperative hurts no one by serving only its members.

A duty of compulsory service rests on public utilities, but it has always been held that to compel one not a public utility to enter into contracts against its will is a confiscation of private property and a violation of due process. *Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583, 592; *Michigan Commission v. Duke*, 266 U. S. 576; *Smith v. Cahoon*, 283 U. S. 553, 563; *Allen v. Railroad Commission*, 179 Cal. 68, 88, 175 P. 466.

The District Court of Appeal extends the rule applicable to public utilities to the insurance business. This itself goes well beyond *Nebbia*. But it does not answer the issue which appellant presents. That issue is not whether commercial insurers for profit may be compelled to insure but whether a non-profit cooperative may be compelled to in-

sure non-members of the group it was organized to insure and to which it has always restricted its contracts.

The very essence of the rule as to public utilities is that when one has in fact voluntarily offered to deal with the public generally, he may not discriminate within the scope of his voluntary dedication or offer. It is a rule against discrimination. It does not extend the scope of the party's offer. If he has not offered to deal generally with the public, he cannot constitutionally be compelled to do so. It is repeatedly said that "consistently with the due process clause of the Fourteenth Amendment" a private utility may not be converted against its will into a public utility by mere legislative command. *Frost & Frost Trucking Co. v. Railroad Commission*, supra; *Michigan Commission v. Duke*, supra. Similarly, even a public utility cannot be compelled to serve beyond the limits to which its voluntary dedication has extended. *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 595; *Hollywood Chamber of Commerce v. Railroad Commission*, 192 Cal. 307, 310, 219 P. 983.

If it be said of corporate insurers engaged in business for profit that they have already offered to do business with the public generally and that, by analogy to public utilities, they may be compelled to serve within the full ambit of that offer, such argument can have no relation to appellant. The scope of *its* activities, the extent of *its* offer, the ambit of *its* dedication since its inception, has been to serve only members of the State Automobile Association.

The rule that a private utility cannot constitutionally be converted into a public utility has always been applied with particular force to cooperatives. *Frost Trucking Co. v. Railroad Commission*, supra, and annotations, 98 A.L.R. 226, and 132 A.L.R. 1495.

The District Court of Appeal argues that *Stephenson v. Binford*, 287 U. S. 251, changed the law. But the *Stephenson* case only holds that private carriers are subject to

"regulation". It expressly recognized the distinction that they cannot be compelled to serve the public. The question whether "petitioner could constitutionally be required to alter so radically its type of operation" is quite "a different problem". *Fordham Bus Corporation v. United States*, 41 F. Supp. 712 (three judge court, per Frank, J.); cf. *Roig v. People of Puerto Rico*, 147 F. 2d 87, 90 (1 Cir.).

The District Court of Appeal would further avoid the foregoing principles by asserting (96 A.C.A. at 996):

- "The extent of its [appellant's] 'dedication' cannot be measured by its past customs or practices, but must be measured by the extent of its powers under the law. While appellant has heretofore only insured a select group, that does not mean that appellant has 'dedicated' its business to that group."

This is, we submit, a statement of the law contrary to all the authorities. The extent of one's dedication is not a question of law but of fact—the fact of whom it has held itself out as ready to serve. And the facts have been found in favor of appellant. A corporation's charter may empower it to carry for the public generally; yet, if in fact it has never done so or offered to do so, it may not be compelled to do so. The extent of its dedication is measured by what it has done, not by what it would have had the power under the law to do had it so chosen. As Mr. Justice Holmes has said, the "important thing is what it does, not what its charter says." *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252 at 254; *Southern California Edison Co. v. Railroad Commission*, 194 Cal. 757, 763, 230 P. 661.

While California law permits reciprocals to be organized to insure everyone, appellant was not so organized. Any particular reciprocal is limited by the power of attorney which each participant executes, the form of which is filed with the Insurance Commissioner (Cal. Ins. Code, Sec.

1320). The power of attorney used by appellant from its inception has provided that only members of the California State Automobile Association are eligible to apply for insurance. By signing the power of attorney each insured member agrees to be bound for the losses of others if they are members of the Automobile Association but not otherwise. To subject appellant to the Assigned Risk Law compels it to rewrite the terms of its existence.

Finally the District Court of Appeal retreats by saying (96 A.C.A. at 995), "No company can be compelled to assume a risk." But it adds: "But if it refuses to accept an assigned risk, its right to do business in this state may be terminated."

This view of law conflicts with the doctrine of *unconstitutional conditions*. A lawful power of a state—even the power to grant or deny a privilege—cannot be exercised as an instrument to accomplish an unconstitutional result. *Frost Trucking Co. v. Railroad Commission*, 270 U. S. 583, 593; *Thompson v. Consolidated Gas Co.*, 300 U. S. 55, 77-79 (per Brandeis, J.); *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 434 (per Holmes, J.); *Western Union Tel. Co. v. Foster*, 247 U. S. 105, 114 (per Holmes, J.); *Phillips Petroleum Company v. Jenkins*, 297 U. S. 629, 634. What may not be done directly may not be done indirectly. The inquiry must be whether federal constitutional rights have been denied in substance and effect. *Oyama v. California*, 332 U. S. 633, 636.

In recent years this principle has been invoked and applied for the protection of civil rights. Cf. *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885; *Hague v. C.I.O.*, 307 U. S. 514, 515. And see discussion by Justin Miller, formerly of the Court of Appeals of the District of Columbia, in 9 F. R. D. 217 at 233.

Unless appellant can be compelled to insure non-members, it cannot be deprived of the right to do business for refusal to accept such risks. A state is not permitted "to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it." *Union Pacific Railroad Company v. Commission*, 248 U. S. 67, 70 (per Holmes, J.).

The foregoing cases even limit a state's power to deny a privilege. *A fortiori*, they apply here, where appellant's right to do business is not a privilege derived from the state, for appellant is merely a name in which individuals contract with each other. While that right may be regulated or limited, California has expressed no public policy against reciprocals. It has merely deprived private individuals of the right to engage in cooperative self-help as a tool to coerce them into succumbing to an unconstitutional imposition. The deprivation is here a penalty for refusal to succumb.

The District Court of Appeal emphasizes the belief of the state legislature that public policy requires that those desiring automobile liability insurance should be able to obtain it. That belief does not permit the state to compel natural persons to devote their property to public uses. As stated by Mr. Justice Holmes (*Pennsylvania Coal Co. v. Mahon*, 263 U. S. 393, 416):

"A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

The decision of the District Court of Appeal presses the power of the state over its citizens beyond any limit here-

tofore believed constitutionally proper. If allowed to stand, it will be a point of new departure.

Dated: August 3, 1950.

Respectfully submitted,

BROBECK, PHLEGER & HARRISON,

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Attorneys for Petitioner and Appellant.

APPENDIX

[96 A.C.A. 973]

**IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF CALIFORNIA IN AND FOR THE FIRST
APPELLATE DISTRICT, DIVISION ONE**

1 Civil No. 14,078

**CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSUR-
ANCE BUREAU, Appellant****VS.****WALLACE K. DOWNEY, INSURANCE COMMISSIONER OF THE
STATE OF CALIFORNIA, Respondent****Opinion**

[975] **PETERS, P.J.**—The Insurance Commissioner of California suspended the right of the California State Automobile Association Inter-Insurance Bureau to transact the automobile liability insurance business in this state because of the refusal of the bureau to subscribe to or participate in the California Automobile Assigned Risk Plan. (Cal. Admin. Code, title 10, §§ 2400-2498.) This plan had been approved and promulgated by the commissioner under the claimed authority of the Assigned Risk Law. (Stats., 1947, chap. 1205, p. 2714; Ins. Code, §§ 11620-11627.) Pursuant to section 11523 of the Government Code as amended in 1947, the bureau sought, by mandate, to compel the commissioner to restore its right to do business. From a judgment denying the petition for this writ the bureau appeals.

There are no substantial controverted factual issues presented on this appeal. The basic contentions of appellant are that the Assigned Risk Law is unconstitutional and that, as applied to appellant, the Assigned Risk Plan is invalid.

The issues presented are of vital importance to those engaged in the automobile insurance industry, and to various segments of the public. This interest is partially reflected in the fact that amici curiae briefs have been filed,

all in support of respondent, by 81 companies writing automobile insurance in California, another by an attorney representing the California Association of Insurance Agents, the Insurance Brokers Society of Southern California, and The Society of Insurance Brokers, while still another on behalf of The National Association [976] for the Advancement of Colored People. These briefs, as well as the excellent briefs prepared by counsel for both litigants, and the two oral arguments, have been of great assistance to the court in deciding the somewhat complex questions presented.

Background of Appellant

The California State Automobile Association was organized and incorporated in 1907 as a motor club for the purpose of advancing the interests of the motoring public. By the year 1914, many of its members requested that the association care for their automobile insurance needs. Many members felt that the rates charged by the private companies were high and unsatisfactory. The association, in the year mentioned, created appellant, the California State Automobile Association Inter-Insurance Bureau, in order to offer to its membership a plan of automobile insurance at a lower cost than the then prevailing rates.

The bureau is somewhat difficult to classify. It is a reciprocal or inter-insurance exchange. It is open only to members of the association. Its executive body, called the "Insurance Board" is elected by the board of directors of the association, and is composed of the same number of members as the board of directors of the association. Participation by the members of the association is voluntary. Each member desiring to join the bureau executes a power of attorney to the same agent, authorizing him or it to enter into agreements of insurance. The members act as insurers of one another. No premiums, as such, are paid. Each member makes an annual deposit which is credited to him. The deposit fund is used to pay losses and expenses, for which purposes a proportionate amount is deducted from the deposit of each member. The operations of such

organizations are regulated by sections 1280 to 1530 of the Insurance Code.

In many ways such an organization resembles a mutual insurance corporation. Its basic differences from such an organization are in mechanics of operation and in legal theory, rather than in substance. Appellant asserts that it is not a legal entity, which is undoubtedly technically correct. Obviously, it provides for a form of cooperative insurance by means of a joint venture or limited partnership. For various purposes, the law has treated such an organization as if it were a separate entity. Thus, persons, natural or corporate, holding the powers of attorney must procure a certificate of authority from the Insurance Commissioner (Ins. Code, § 1350); its finances are minutely regulated (Ins. Code, §§ 1370-1375); it [977] can sue or be sued in its own name (Ins. Code, § 1450); a member or subscriber cannot be sued on any obligation contained in the power of attorney until a final judgment against the inter-insurance bureau has been unsatisfied for 30 days (Ins. Code, § 1451); all moneys received from members and not returned are subject to the gross premium tax placed on insurance companies (Ins. Code, § 1530; *Industrial Indem. Exch. v. State Bd. of Equalization*, 26 Cal. 2d 772 [161 P. 2d 222]); and for purposes of liquidation it is an entity (*Mitchell v. Pacific Greyhound Lines*, 33 Cal. App. 2d 53 [91 P. 2d 176]).

History of the Assigned Risk Law

The tremendous increase in the number of motor vehicles in recent years, the great number of automobile accidents, the enormous loss to the persons injured where the person at fault is uninsured and unable to respond in damages, and the natural desire of the automobile insurance companies to keep their losses down by limiting their policies to selected risks, have created many problems which the legislatures of many states have studied and attempted to solve. Nearly every state provides for the licensing of drivers, and many for their careful examination to weed out the unfit. Some states have provided for compulsory insurance as a prerequisite to the issuance of a driver's

license, while others have provided a form of limited compulsory insurance by requiring certain persons to give proof of financial responsibility before they may secure a license to drive.

The California Legislature has given much thought to this problem. As early as 1929, it adopted a statute providing for the suspension of the license to operate a motor vehicle of certain persons for various reasons, including the failure of a driver or owner to pay a final judgment of \$100 or more for personal or property damage arising out of the operation of a motor vehicle. (Stats. 1929, chap. 258, § 4, p. 560.) This portion of the statute has been several times amended and has been codified in the Vehicle Code as section 410. The entire act is now found in sections 410 to 420.9 of the Vehicle Code. The act provides that one against whom such a judgment has been secured can lift the suspension only by paying the judgment and establishing his ability to pay claims that may arise from future accidents. Such ability to pay may be established by proof that the person involved is now insured, or he may post a surety bond, or he may deposit \$11,000 in cash with the State Treasurer.

Another step in the same direction was taken in 1935. In [1935] that year, the City Carriers' Act was adopted. (Stats. 1935, chap. 312, p. 1057.) That act applies to highway carriers operating in any city of the state, and requires such operators to secure liability insurance, or give other evidence of financial responsibility, as a condition prerequisite to securing a permit to operate trucks for hire.

These statutes had one effect that was perhaps not foreseen by the Legislature, and that was that many competent drivers, many of whom depended for a living upon driving a motor vehicle, were prevented from operating motor vehicles because of their inability to secure an insurance policy or to give other proof of their financial responsibility. This was particularly true of a large number of small truck operators to whom insurance companies were reluctant to issue policies and who could not make the \$15,000 cash deposit required. Many of these operators were refused insurance not because they were bad drivers, or not because

they had a bad accident history or criminal record, but simply because many insurance companies believed that small truck operators, as a class, were a bad risk in view of the unfavorable loss ratios caused by the increasing accident rate, large jury verdicts, etc. Other large groups of drivers who apparently had difficulty in securing or were unable to secure insurance were violators of traffic laws, members of minority groups, particularly the colored drivers, persons with minor physical disabilities, the young and the old drivers and, of course, those who had bad accident records.

Such a situation created much hardship and many inequities, and various solutions were offered to the Legislature, one of which was that the state go into the insurance business and assume these and other risks. This was a solution opposed and feared by the insurance companies. Faced with these various pressures, in 1942, all insurance companies, handling automobile insurance in California, including appellant, adopted a voluntary "assigned risk" plan, which provided a method for insuring some, but not all, of the groups that were unable, otherwise, to secure insurance. This plan was approved by the State Insurance Department and became effective July 1, 1942. Under this plan, approved applicants for insurance were allocated to the subscribing insurers in proportion to the amount of automobile insurance written by each subscribing insurer the preceding year. In 1943, the Legislature facilitated the operation of the plan and recognized it by enacting sections 1110 to 1113 of the Insurance Code.

This voluntary plan alleviated, in some degree, the situation created by the statutes of 1929 and 1935, but it was only [979] a partial palliative. It was strictly limited to persons required to procure and maintain insurance in order to operate their automobiles or trucks. Other persons who for one reason or another were deemed greater than ordinary risks by insurers were not covered by the voluntary plan.

Appellant, as already mentioned, was a subscriber to the voluntary plan, but all during the time it participated it adhered, strictly, to its policy of insuring only members of

the California State Automobile Association, some of whom were members of the restricted groups. Late in 1946 or early in 1947, appellant withdrew from the plan. This immediately imperilled the soundness of the voluntary plan. One of the largest insurers in the state was refusing to take a share of the assigned risks, thus increasing the proportionate number other insurers were expected to take. The other insurers were reluctant to continue the voluntary plan under such circumstances. In this emergency the Legislature, then in session, promptly acted. It passed, as an emergency measure, the Compulsory Assigned Risk Law (Stats. 1947, chap. 39, p. 525) which became effective February 17, 1947. It provided that, after consultation with insurers writing automobile insurance, the commissioner shall approve "a reasonable plan for the equitable apportionment among such insurers of applicants for automobile . . . insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods." Upon the adoption of such a plan "all such insurers shall subscribe thereto and shall participate therein." The Legislature declared the act to be an urgency measure "necessary for the immediate preservation of the public peace, health and safety," and declared the nature of the emergency in the following language:

"Under provisions of the Vehicle Code, certain persons who have been involved in motor vehicle law violations are required to file insurance policies or other evidence of financial responsibility with the State in order to continue lawfully to operate motor vehicles upon the public highways of the State.

"Because insurers are naturally reluctant to grant insurance to such persons, it has been necessary to devise a plan for allocating such risks upon an equitable plan to the insurers engaged in the business. Such a plan, dependent upon the voluntary consent of all insurers, has been in effect for a number of years, but has recently ceased to operate because of the withdrawal of one of the subscribing insurers.

"Unless this act takes immediate effect, many persons who are insured under the former plan will be deprived of

their [1980] insurance and those seeking to obtain such insurance will be unable to do so. Both classes will be deprived of the opportunity to operate motor vehicles upon the public highways, with a consequent loss in earning power in many cases and serious hardship in others; or in the alternative may continue to operate such vehicles in violation of the law, with a resultant increased burden on law enforcement agencies and a probable increase in disrespect for law."



Present Compulsory Assigned Risk Law

The above statute was amended by the same Legislature that had passed the emergency act (Stats. 1947, chap. 1205, p. 2714), by amending section 11620 of the Insurance Code and enacting sections 11621-11627 of that code. It is these statutes, and the plan adopted pursuant thereto, that are attacked by appellant in this proceeding. Section 11620, as then amended, provides in part as follows: "The commissioner, after a public hearing, shall approve or issue a reasonable plan for the equitable apportionment, among insurers admitted to transact liability insurance, of those applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods. The commissioner may approve or issue reasonable amendments to such plan if he first holds a public hearing to determine whether the amendments are in keeping with the intent and purpose of this section. All such insurers shall subscribe to the plan and its amendments and, subject to Section 11621, participate therein."

Provision is then made in the section for a statutory notice of hearings on the proposed plan. Section 11621, after providing that assignments of risks shall not be made in certain instances not here involved, then states: "In so far as possible, assignments under the plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber." Section 11622 provides the amount of coverage required, while section 11623 authorizes the subscribing insurers to "form their own

organization which shall, subject to review by the Insurance Commissioner, administer and operate the plan." Section 11624 provides that the plan adopted pursuant to the statute shall contain:

"(a) Standards for determining eligibility of applicants for insurance, and in establishing such standards the following may be taken into consideration in respect to the applicant . . .

"(1) His criminal conviction record; [981]

"(2) His record of suspension or revocation of a license to operate an automobile;

"(3) His automobile accident record;

"(4) His age and mental, physical and moral characteristics which pertain to his ability to safely and lawfully operate an automobile;

"(5) The condition or use of the automobile.

"(b) Procedures for making application for insurance, for apportionment of eligible applicants among the subscribing insurers and for appeal to the commissioner by persons who believe themselves aggrieved by the operation of the plan,

"(c) Rules and regulations governing the administration and operation of the plan,

"(d) Provisions showing the basis upon which premium charges shall be made and

"(e) Such other provisions as may be necessary to carry out the purpose of this article."

Section 11625 provides that if any insurer fails to subscribe to the plan, the commissioner shall give such company 10 days' written notice to subscribe. If the insurer still refuses to participate, the commissioner "may, after hearing upon notice, suspend the certificate of authority of such insurer to transact liability insurance in this State until such insurer does so subscribe." Section 11626 provides for discipline of subscribers who violate the plan, while section 11627 provides that the term "insurer" includes "reciprocal or interinsurance exchanges."

At the same session of the Legislature that passed this statute there was also passed the Highway Safety Responsi-

bility Law. (Stats. 1947, chap. 1235, p. 2738, adding §§ 419 to 420.9 to the Vehicle Code.) This law provides for the suspension, regardless of fault, of the license of the operator of any motor vehicle involved in an accident within the state in which injury to any person, or property damage in excess of \$100 results unless the operator is insured or puts up a cash deposit. This law greatly aggravated the need for an assigned risk plan because it tremendously increased the number of persons required to carry insurance or give other evidence of their financial responsibility.

The Assigned Risk Plan

The commissioner, acting pursuant to the provisions of the Assigned Risk Law, held a hearing in October of 1947, on an assigned risk plan proposed by the automobile insurers operating in this state. Appellant appeared at that hearing [1982] and attacked the constitutionality of the Assigned Risk Law, but also stated that it would give consideration to accepting the plan voluntarily if the proposed plan were modified so as to give recognition to appellant's policy of insuring only members of the California State Automobile Association. This condition was not acceptable to the commissioner nor to the committee. The plan was adopted without such a provision, and appellant refused to subscribe to it. The commissioner acting pursuant to section 11625 of the Insurance Code, suspended appellant's permit to transact automobile liability insurance in California. The appellant sought to review and annul this order of suspension by means of a petition for writ of mandate filed in the superior court. That court denied the petition and appellant has appealed. By stipulation of counsel, and by order of this court, the operation of the suspension order was stayed pending the final determination of the case on appeal. (Code Civ. Proc., § 1094.5f.)

Provisions of the Challenged Plan

Before directly discussing the contentions of appellant, reference should be made to the general provisions of the Assigned Risk Plan. The plan is to be found in the California Administrative Code, title 10, sections 2400 to 2498.

The plan is available to all residents of California and to nonresidents using automobiles registered in this state. (§ 2404.) Policies issued under the plan shall provide a \$5,000-\$10,000 coverage. (§ 2406.) The plan is to be administered by a committee of five elected by the insurers and representing the various types of insurers doing business in this state. (§§ 2421 and 2421.1.) The committee appoints a manager who is to be the administrative executive of the plan and who makes all assignments of risk. (§ 2422.) Applicants "who are in good faith entitled" to insurance but are unable to procure it through ordinary channels, are eligible. (§ 2430.) The same section provides that an applicant shall be deemed to be in good faith entitled to insurance unless he is within certain specified categories. The excluded categories include those who, within three years prior to their application, have been convicted more than once of any of the following offenses:

- a. Failing to stop and report when involved in an accident.
- b. Manslaughter or negligent homicide resulting from operation of the vehicle.
- c. Theft or unlawful taking of a vehicle.
- d. Any felony in which an automobile was used.

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- e. Driving under the influence of liquor and causing death or bodily injury to another.

- f. Driving while licenses are suspended or revoked.

- g. Permitting unlawful use of driver's license or any other offense under section 338 of the Vehicle Code (§ 2431.1); or within the same three-year period has been convicted more than twice of:

- a. Driving while intoxicated or under the influence of liquor.

- b. Driving in a reckless manner where injury to person or property results.

- c. Driving at excessive rate of speed where injury to person or property results. (§ 2431.)

It is also provided that other persons not "in good faith entitled" to insurance are:

1. Those addicted to use of drugs. (§ 2431.1a.)
2. Those habitually using alcohol to excess. (§ 2431.2a.)
3. Those failing to disclose serious motor accidents or traffic violations in their applications. (§ 2431.3)
4. Those found to have operated vehicle more than once while license was suspended or revoked. (§ 2431.3a.)
5. Those with defective automobiles who have failed to repair them at the committee's demand. (§ 2431.4.)
6. Those who failed to pay insurance premiums on automobile insurance during the past year. (§ 2431.5.)
7. Those with a major mental or physical disability. (§ 2431.5a.)
8. If the risk consists of or includes a vehicle carrying passengers for compensation. (§ 2431.6.)
9. If the risk consists of a vehicle used in transporting explosives, gasoline or other highly inflammable or explosive materials. (§ 2431.6a.)
10. Those under 18 who cannot show hardship. (§ 2431.7a.)
11. Those whose driving would, in the opinion of the committee, endanger public safety. The entire history of the applicant may be examined in making such a determination. (§ 2431.8.)

Section 2445.1 provides: "Insofar as possible, assignments shall be consistent with the scope of territorial operations and underwriting policies of each insurer, of which the Manager shall have been notified in writing. Underwriting policy is policy founded on underwriting judgment of the hazards involved. Without in any way limiting or enlarging the meaning of the term 'underwriting policy', policy excluding from insurance an applicant solely by reason of the fact of his non-membership in an organization is not underwriting [984] policy. Underwriting policy excluding from insurance applicants solely by reason of facts or circumstances not sufficient to render them not in good faith entitled, under this Plan, to insurance is incon-

sistent with the purposes of this Plan and of the statute under which it is approved and issued."

The only other section now necessary to mention is section 2461 which provides that: "If the experience, physical or other condition of any risk assigned under the Plan is such as makes the hazard of the risk greater than that contemplated by . . . [the normal rates] . . . the insurer . . . may charge such rates and minimum premiums as are commensurate with the greater hazard of the risk, subject to the approval of the Committee."

Constitutional Argument of Appellant

Appellant directs its main arguments against sections 11620 and 11627 of the Insurance Code, contending that, for various reasons, those sections deny to it due process of law in violation of the Fourteenth Amendment to the United States Constitution. The arguments can be summarized as follows:

It is urged that the insurance business is not a public calling; that while the United States Supreme Court, in *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 [34 S. Ct. 612, 58 L. Ed. 1011], upheld the regulation of charges made by such companies, that decision is predicated upon the assumption that insurance companies cannot be compelled to make contracts against their will; that the present statute compels appellant to enter into contracts against its will and thus treats appellant, a private business, as if it were a public utility; that although a business may be impressed with a public interest so as to be subject to state regulation, the right thus to regulate does not include the power of the state to compel businesses that have not dedicated their property to the public to enter into contracts against their will. (*Allen v. Railroad Commission*, 179 Cal. 68, 88 [175 P. 466, 8 A. L. R. 249], is cited in support of this contention.)

Appellant next argues that, even in the public utility field, one who serves only a limited group cannot be compelled to serve others. In this connection reliance is placed on a line of cases which hold that a private carrier cannot

be compelled to accept business, but may refuse service on the basis of convenience. (*Forsyth v. San Joaquin Light etc. Corp.*, 208 Cal. 397 [281 P. 620]; *Morel v. Railroad Commission*, 11 Cal. 2d 488 [81 P. 2d 144], and *Stephenson v. Binford*, 287 U. S. 251 [53 S. Ct. 181, 77 L. Ed. 288, 87 A. L. R. 721], are typical of the [985] cases cited to support this argument.) It is then argued that, even if the insurance business were subject to the same degree of control as a public utility, appellant cannot be compelled to accept nonmember risks because appellant has heretofore restricted its operations to contracting only with members of the California State Automobile Association. Thus, it is contended, appellant is not a public insurer, and cannot be compelled to serve others. The power to regulate does not include the power to compel a company to furnish service. Such cases as *Associated etc. Co. v. Railroad Commission*, 176 Cal. 518 [169 P. 62, L. R. A. 1918C 849]; *Allen v. Railroad Commission*, 179 Cal. 68 [175 P. 466, 8 A. L. R. 249]; *Frost v. Railroad Commission*, 197 Cal. 230 [240 P. 26], reversed in 271 U. S. 583 [46 S. Ct. 605, 70 L. Ed. 1101, 47 A. L. R. 457]; *Morel v. Railroad Commission*, 11 Cal. 2d 488 [81 P. 2d 144]; *Cudahy Packing Co. v. Johnson*, 12 Cal. 2d 583 [86 P. 348]; *Trask v. Moore*, 24 Cal. 2d 365 [149 P. 2d 854]; *Ocean Park etc. Corp. v. Santa Monica*, 40 Cal. App. 2d 76 [104 P. 2d 668, 879], and others (see, also, note 175 A. L. R. 1333), are relied upon as establishing the principle that a statute which subjects a contract carrier to the burdens of a public utility violates the due process clause. This principle is peculiarly applicable to cooperatives, according to appellant, it being contended that a cooperative cannot be regulated like a public utility. (*Frost v. Railroad Commission*, 271 U. S. 583 [46 S. Ct. 605, 70 L. Ed. 1101, 47 A. L. R. 457]; *Hissem v. Guran*, 112 Ohio St. 59 [146 N. E. 808]; *State v. Nelson*, 65 Utah 457 [238 P. 237, 42 A. L. R. 849]; *Garkane Power Co. v. Public Service Commission*, 98 Utah 466 [100 P. 2d 571, 132 A. L. R. 1490], are cited in support of this proposition.)

It is next urged that the fact that a license is required does not give the state the power to deny to appellant the privilege of doing business or exacting an improper price for its

approval. (*Frost v. Railroad Commission*, *supra*; *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536 [171 P. 2d 885]; *Union Pacific R. R. Co. v. Public Service Commission*, 248 U. S. 67 [39 S. Ct. 24, 63 L. Ed. 131], are supported as establishing this proposition.)

Finally, it is argued that the plan is not essential to the Financial Responsibility Law; that it forces the members of the association to pay for injuries caused by nonmember drivers who are bad risks, and that, in effect, the plan constitutes an attack on a non-profit cooperative by its competitors. For these and other reasons appellant urges that the plan violates its constitutional rights.

[986] Discussion of the Constitutional Arguments

Most of the cases cited by appellant deal only with the application of general rules to the particular facts there involved, and are applicable here, if at all, only indirectly by way of analogy. Appellant does, however, cite one case that contains language that directly upholds its position. That case is *Employers' Liability Assur. Corp. v. Frost*, 48 Ariz. 402 [62 P. 2d 320, 107 A.L.R. 1413] decided in 1936, by the Arizona Supreme Court. (An annotation on the case is to be found in 107 A.L.R. 1421, and a supplementary annotation in 123 A.L.R. 139.) The *Frost* case involved a state statute which compelled insurance companies writing workmen's compensation insurance to accept all applications, and to waive the right to investigate and inform itself of the risks and hazards incident thereto. The court, among other things, held that the statute violated the freedom to contract right guaranteed by the Fourteenth Amendment. The court pointed out that (p. 324 [62 P. 2d]): "The courts have gone far in upholding the right of the state to regulate and control insurance business within its boundaries, but we have found no case where the facts, as here, call for a decision upon the power of the Legislature to make it mandatory upon an insurance company qualifying under its laws to carry a certain kind of insurance to insure all risks of that kind 'for which application may be made to it which are not prohibited by law.' " This case is contrary to the decisions of the Supreme Judicial Court of Massachusetts,

and of the Supreme Court of Texas, decisions which had been rendered when the Arizona court decided its case in 1936, but which are not referred to by it. (See *In re Opinion of the Justices* (1925), 251 Mass. 569 [147 N. E. 681]; *Harris v. Traders' & General Ins. Co.* (1935), (Tex. Civ. App.) 82 S.W. 2d 750; *Texas Employers' Ins. Ass'n. v. U. S. Torpedo Co.* (1928), (Tex. Civ. App.) 8 S.W. 2d 266, aff. in 1930 in 26 S.W. 2d 1057; see, also, the later Massachusetts case of *Factory Mut. Liability Ins. Co. v. Justices of Superior Court* (1938), 300 Mass. 513 [16 N.E. 2d 38], and the later, 1939, Texas case of *Federal Underwriters Exchange v. Walker*, (Tex. Civ. App.) 134 S.W. 2d 388.) Several of these cases will be discussed later.

The Arizona Supreme Court, as an alternative ground for its decision, pointed out that the Arizona State Compensation Insurance Fund was allowed, but not compelled, to accept insurance from employers. After quoting the pertinent portion of the statute so providing the court stated (p. 323 [62 P. 2d]): "This language is permissive and not mandatory. [987] The provisions of section 1422, however, leave to insurance companies no alternative; they must write all applications. There is no reason, real or apparent, for this provision unless it be that it was put into the law as a deterrent to private insurance companies to enter the field of compensation insurance in competition with the state compensation fund. If that was the motive, the law should have prohibited insurance companies from selling compensation insurance in Arizona and not undertaken to compel them to insure all applications regardless of the hazards." This ground of the decision is undoubtedly sound; the freedom of contract argument is not.

The difficulty with appellant's argument, and with the Arizona case, is that they disregard or treat cavalierly, most of the relatively recent constitutional law cases dealing with the subject of the police power, and rely upon the earlier cases containing a very restricted viewpoint of the state's police power. Thus, many of the principles discussed in *Frost v. Railroad Commission*, 271 U. S. 583 [46 S. Ct. 605, 70 L. Ed. 1101, 47 A.L.R. 457], and *Michigan Pub. Util. Com. v. Duke*, 266 U. S. 570 [45 S. Ct. 191, 69-

L. Ed. 445], relied upon by appellant, which cases held that a contract carrier could not be subjected to the burdens imposed on a public utility, were drastically modified as early as 1932 in *Stephenson v. Binford*, 287 U. S. 251 [53 S. Ct. 181, 77 L. Ed. 288, 87 A.L.R. 721]. That case, and those following it, have held that if the business is affected with a public interest (and the insurance business is—*German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 [34 S. Ct. 612, 58 L. Ed. 1011]), the validity of the regulation depends primarily upon whether the challenged legislation is reasonably appropriate to the ends sought to be attained.

Starting in 1934, with the case of *Nebbia v. New York*, 291 U. S. 502 [54 S. Ct. 505, 78 L. Ed. 940], there has been a marked development and advance in the attitude of the United States Supreme Court towards regulatory legislation. That case held that the State of New York could, by statute, fix the minimum and maximum sales prices of milk in that state. *Nebbia* argued that such a statute violated the due process and equal protection clauses of the Fourteenth Amendment. Some of the comments of Mr. Justice Roberts, the author of the majority opinion, are peculiarly applicable to the present case. Thus, at page 523 it is stated: "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. [988] But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

And at page 525: "The Fifth Amendment, . . . and the Fourteenth, . . . do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall

have a real and substantial relation to the object sought to be obtained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

And at page 527: "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency."

Nebbia argued that the milk industry was not a public utility, and that the public power over rates could be validly exercised only over business affected with a public interest—that is, according to Nebbia, only over public utilities. The court conceded that the milk industry was not a public utility, but held that it was a business affected with a public interest and therefore subject to regulation. Quoting from *Munn v. Illinois*, 94 U. S. 113 [24 L. Ed. 77], the court (p. 533) held that: "'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.'" On the same page this thought was expressed: "Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression." Still referring to the *Munn* case, the court continued the discussion as follows (p. 533):

"In the further discussion of the principle it is said that when one devotes his property to a use, 'in which the public [1989] has an interest,' he in effect 'grants to the public an interest in that use' and must submit to be controlled for the common good. The conclusion is that if *Munn* and *Scott* wished to avoid having their business regulated they should not have embarked their property in an industry which is subject to regulation in the public interest.

"The true interpretation of the court's language [in *Munn v. Illinois*] is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously Munn and Scott had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue."

In further discussing this subject, the court directly discussed the insurance business. It pointed out that, because of the great need for insurance protection, and because competing insurers had agreed upon a fixed schedule of rates, the court had upheld, in *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 [34 S. Ct. 612, 58 L. Ed. 1011], a statute fixing the premium rates on fire insurance. Still referring, by analogy, to the field of insurance, the court, at page 535, stated: "Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. . . . Insurance agents' compensation may be regulated, though their contracts are private, because the business of insurance is considered one property subject to public control."

And at page 536 it stated: "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. . . . The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. . . . These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But

there can be no doubt that [1990] upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co. v. United States*, 193 U. S. 197, 337-8 [24 S. Ct. 436, 48 L. Ed. 679.] And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."

The *Nebbia* case has been frequently cited with approval, and its doctrine of state power over business and industry steadily expanded. Whenever a state determines, in good faith, that a practice of an industry is injurious to the public, the state may control the practice even where the legislation directly affects the internal affairs of a business or industry, as long as the legislation is neither arbitrary nor discriminatory. A few citations and examples will serve to illustrate the extent of this control.

In *Lincoln Federal Labor Un. v. Northwestern I. & M. Co.*, 335 U. S. 525, 536 [— S. Ct. —, — L. Ed. —], the court stated: "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the

due process philosophy enunciated in the *Adair-Coppage* line of cases [208 U. S. 161 (28 S. Ct. 277, 52 L. Ed. 436)]. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional [991] prohibition, or of some valid federal law. [Citing cases.] Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."

In *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 [57 S. Ct. 578, 81 L. Ed. 703, 108 A. L. R. 1330], the court upheld the constitutionality of the State of Washington's minimum wage law for women and minors. The court reiterated the principle that freedom of contract is a qualified and not an absolute right, and again stated that the test of unconstitutionality was whether the legislation was arbitrary or capricious, "that is all we have to decide." (P. 399.)

In *Osborn v. Ozlin*, 310 U. S. 53 [60 S. Ct. 758, 84 L. Ed. 1074], the court upheld the constitutionality of a Virginia statute which provided that insurance companies doing a casualty and risk business within the state must handle such insurance "through regularly constituted and registered resident agents or agencies of such companies," and that such resident agents should receive the usual commissions and could not share more than one-half of a commission with a nonresident licensed broker. Speaking of the power which the state has over the regulation of insurance companies, the court said (p. 65): "It is not our province to measure the social advantage to Virginia of regulating the conduct of insurance companies within her borders insofar as it affects Virginia risks. Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix

insurance rates, . . . it may regulate the compensation of agents, . . . it may curtail drastically the area of free contract. . . . States have controlled the expenses of insurance companies. . . . They have also promoted insurance through savings banks. . . . In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, . . . or might take 'the whole business of banking under its control,' . . . If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards. . . . [992] All these are questions of policy not for us to judge. For it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty. The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control."

A case peculiarly applicable here in *Hoopeston Can Co. v. Cullen*, 318 U. S. 313 [63 S. Ct. 602, 87 L. Ed. 777]. There the issue before the court was whether appellant reciprocal insurance associations (insurers against fire and other related risks) whose attorneys in fact were located in Illinois, could constitutionally be made subject to the laws of New York as a condition of insuring property in that state. After holding that New York had the power to regulate these companies, the court considered the question of whether the particular regulations objected to by the appellants were in violation of the due process clause. Particularly objected to by the appellants was a prohibition against making new agreements with subscribers who did not have assets in excess of ten thousand dollars. The court said (p. 321): "The appellants earnestly insist that theirs is a successful system of cooperative insurance which gives complete security with substantial economy to their members, and that their New York subscribers may lose the benefits of this form of insurance by reason of the reciprocals'

inability to comply with the requirements of the New York law. That the reciprocals save for their members from 25 to 50 per cent of the cost of ordinary commercial insurance and that the members are well satisfied with the system they have created is not controverted by counsel for the state of New York. However persuasive such arguments might be is addressed to the state legislature, they present no constitutional barrier which prevents New York from enforcing these regulations if it chooses." (See, also, *Hardware Dealers Mut. F. Ins. Co. v. Glidden Co.*, 284 U. S. 151 [52 S. Ct. 69, 76 L. Ed. 214].)

In California, it has been held that: "It is settled law of California that the business of insurance is one affected with a public interest." (*Caminetti v. State Mut. Life Ins. Co.*, 52 Cal. App. 2d 321, 324 [126 P. 2d 165].) In that case the appellate court affirmed an order of the lower court refusing to vacate an order appointing the commissioner as conservator for a mutual insurance company where the evidence showed that the payment of a \$1,000 monthly salary to the executive vice-president was hazardous to the company.

Many other cases could be cited, but these are sufficient to [993] illustrate the trend of decisions. The above cases deal with general principles, and not with the specific problem here involved. But we are not without authority—state authority it is true—on the precise question. Massachusetts enacted a compulsory automobile insurance law requiring all drivers to be licensed, and all licensed drivers to give security for civil liability growing out of the operation of motor vehicles. One form of approved security was a liability insurance policy. The statute, in detail, provided for the form of such policies by requiring them to contain certain provisions and prohibited others, and also regulated premiums. The statute also provided that if any appellant was refused a policy, or if his policy was canceled, he could apply to a statutory board of appeal which was authorized to determine if such refusal or cancellation was "reasonable," and whether the applicant was a "proper person" to whom a policy should be issued. If the board of appeal decided in favor of the applicant, the insurance company

was required to issue a policy, and, upon refusal, its license to do business was to be suspended. In an advisory opinion to the Legislature—*Opinion of the Justices*, 251 Mass. 569 [147 N. E. 681]—the Supreme Judicial Court of Massachusetts held that the statute, in all respects, was constitutional. After holding that the business of automobile liability insurance affected the public interest, and after upholding the compulsory provisions of the act including the provisions relating to the content of the policies and the regulation of charges, etc., the court upheld the provision requiring insurance companies to issue policies to applicants found reasonably entitled to insurance by the board of appeals. At page 613 the court discussed this problem as follows: "The several features of the proposed bill set forth in the eighth question as provisos constitute serious limitations upon customary methods of conducting the insurance business. The question whether a particular risk shall be assumed by an insurer or surety is an important factor in the conduct of such business. . . . Character, physical capacity, sight, hearing, financial responsibility, record of past conduct, personal habits, nature and extent of business and general reputation are among the elements of essential significance in determining whether motor vehicle liability bonding or insurance for any particular applicant shall be undertaken. To subject the determination of such a vital question by an insurer or surety to review is a great interference with freedom of contract. The right to freedom of contract is secured as a general rule by the constitutions of the Commonwealth and Nation; but [994] there are exceptions where legislative interference with that right is permissible. We are of opinion that the proposed bill in this aspect does not transcend legislative power. The right of the citizen to register a motor vehicle whereby he may travel upon the ways is made strictly conditional upon his depositing cash or securities or upon procuring a motor vehicle liability policy or bond. This, too, is a great interference with freedom of action. The refusal by corporations to issue such policy or sign such bond may drive one out of business or seriously impair his convenience. Where such paramount interests are at stake with sole reference to the use

of public ways provided wholly at the expense of the government, there is constitutional basis for legislative regulation to the end that no injustice may be done. Unwarranted discrimination may arise against certain applicants. Instances may arise of honest difference of opinion whether a policy or bond ought to be issued at all, or whether, after issuance, it ought to be cancelled. To provide an impartial administrative tribunal to settle such controversies, although going to the verge of power, cannot in our opinion be pronounced in excess of the authority conferred by the Constitution upon the General Court."

In *Factory Mut. Liability Ins. Co. v. Justices of Superior Court*, 300 Mass. 513 [16 N.E. 2d 38], in a contested case, the highest court of Massachusetts upheld an order of the board of appeal ordering the insurance company to issue a policy to an applicant who had been refused a policy. There is some language in the opinion particularly applicable here. At page 40 [16 N.E. 2d] the court stated:

"When our Legislature enacted the compulsory motor vehicle insurance law, by which all persons registering motor vehicles are required to provide security for the payment of claims for damages arising from their operation on the public ways, it foresaw the necessity for providing at the same time a procedure under which individuals could compel companies engaging in the business to insure them in the absence of sound reasons for refusal. . . ."

" . . . Nor can a company limit the power of the board and the court to determine whether a refusal is proper and reasonable under all the circumstances by insistence upon answers deemed by it to be satisfactory to such questions as it may see fit to include in an application blank. *And it is plain that no company attempting to engage in this business can take the position that it will insure only pleasure vehicles or limit its operations to that part of the field in which there is [995] the least risk and the most profit.* The compulsory law contemplates, and its successful operation requires, that as to their obligations to issue policies all companies alike should abide by the orders of the board or of the court." (Italics added.)

A similar statute has been upheld in Texas. (*Harris v. Traders' & General Ins. Co.* (Tex. Civ. App.), 82 S. W. 2d 750; *Texas Employers' Ins. Ass'n v. U. S. Torpedo Co.* (Tex. Civ. App.), 8 S. W. 2d 266, aff. in 26 S. W. 2d 1057; *Federal Underwriters Exchange v. Walker* (Tex. Civ. App.), 134 S. W. 2d 388.)

No further reference to the authorities need be made on this phase of the case. The insurance business is one affected with a public interest, and subject to regulation. As long as the statute has a reasonable relation to a proper legislative purpose, and is neither arbitrary nor discriminatory, it is a valid enactment and cannot be successfully challenged under the due process clause of the federal Constitution. That a valid legislative purpose here existed is too clear to require extended discussion. For the protection of persons using the highways, the Legislature determined that certain drivers of motor vehicles had to be insured, or give security. Many in these affected groups could not secure a policy or give security. Their means of livelihood, in many cases, was jeopardized. Their right to use the highways was greatly limited. Some means whereby applicants in good faith entitled to insurance could get it, had to be provided. This could be done either by the state going into the insurance business, or by an assigned risk plan affecting all insurers. The Legislature determined to adopt the latter alternative. The Legislature also determined that such a plan could not operate successfully unless all companies writing liability policies were required to take their share of assigned risks. Otherwise, as pointed out by the Massachusetts court, *supra*, one company could select its risks, and thus gain what the Legislature has determined to be an unfair advantage over its competitors. Unless appellant is required to assume its share of the assigned risks on penalty of losing its license, it will gain an unfair advantage over its competitors. This is a phase of the insurance business clearly subject to regulation. No company can be compelled to assume a risk. But if it refuses to accept an assigned risk, its right to do business in this state may be terminated. The cases heretofore cited clearly establish that the due process clause is no impediment to such a stat-

nte. The state's police powers clearly encompass such regulation.

The argument that such legislation compels appellant [1996] to enter into contracts of insurance against its will, and thus impairs appellant's constitutional right to freedom of contract, and destroys one of the essential elements of a contract—consent—has been fully answered in the cases cited above. The state has said that insurance companies that enter the liability field cannot limit their activities to the most profitable type of business, but must share proportionately the less profitable policies. This infringement on the freedom of contract is justifiable, for reasons already stated. The plan has a reasonable relation to a valid legislative purpose. It is not arbitrary, capricious, or discriminatory. There is therefore no violation of the due process clause.

Appellant, in the briefs and oral arguments, has laid much stress on the contention that, as applied to appellant, the statute compels it to render a service beyond the scope of its claimed dedication to the public service. The argument is fallacious. It is based on the theory that heretofore it has limited its policies to members of the California State Automobile Association, a select group. If appellant has "dedicated" its business to the public service, it has dedicated it to the writing of automobile liability insurance. The extent of its "dedication" cannot be measured by its past customs or practices, but must be measured by the extent of its powers under the law. While appellant has heretofore only insured a select group, that does not mean that appellant has "dedicated" its business to that group. Under the law (Ins. Code, § 108) this company has the legal right to write automobile liability insurance on a statewide basis and for all applicants. That is the real extent of its "dedication".

Nor does the plan give the competitors of appellant any unfair advantage—in fact, to exclude appellant from the plan would be to give it a most unfair advantage over other companies. Appellant writes an appreciable proportion of the automobile liability insurance written in this state. To permit it to select its risks, and to deny that right to its

competitors would be most unfair. The right of the state to regulate a mutual or reciprocal insurance company, and to compel such companies to abide by reasonable regulations applicable to all, is too clear to require further discussion. That is not discrimination—it is applying the rule of uniformity.

Delegation of Legislative Authority to the Commissioner

The second major contention of appellant is that the statute is invalid because it fails to provide an adequate yardstick for the guidance of the commissioner, and thus unlawfully delegates to him legislative powers. There can be no [997] doubt that it is the law that a valid statute cannot delegate unlimited powers to an administrative officer and that, to be valid, the statute must “provide an adequate yardstick for the guidance of the executive or administrative body or officer empowered to execute the law.” (*Blatz Brewing Co. v. Collins*, 69 Cal. App. 2d 639, 645 [160 P. 2d 37], quoting from 11 Am. Jur. 955, § 240; see, also, *American Distilling Co. v. State Bd. of Equalization*, 55 Cal. App. 2d 799 [131 P. 2d 609]; also see 24 Cal. L. Rev. 184; 23 Cal. L. Rev. 435; 8 So. Cal. L. Rev. 226, 255; 29 Cal. L. Rev. 110, 120.) It is this principle appellant seeks to here invoke.

The theory of appellant is that, under the statute, the commissioner is free to determine, at his arbitrary will, what types of applicants insurers will be compelled to insure, and what types they may refuse to insure. It will be remembered that section 11620 of the Insurance Code requires the commissioner to “approve or issue a reasonable plan for the equitable apportionment . . . of those applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods.” Section 11621 requires assignments under the plan “In so far as possible” to be “consistent with the scope of territorial operations and underwriting policies of each subscriber.” Section 11624 requires the plan to contain “Standards for determining eligibility of applicants for insurance,” and provides that the commissioner in estab-

lishing such standards "may" take into consideration five specified factors.

It is the basis of appellant's argument on this point that these statutes limit the commissioner in making assignments only to those "in good faith entitled," and that such words, in fact and in law, place no limitation at all upon the powers of the commissioner. It is claimed that section 11624 constitutes no limitation on the commissioner because its provisions are permissive and not mandatory.

Such a statute provides no standard at all on the power of the commissioner, and constitutes an unlawful delegation of legislative power, according to appellant. Reliance is placed on such cases as *Panama Refining Co. v. Ryan*, 293 U. S. 388 [55 S. Ct. 241, 79 L. Ed. 446]; *Schechter Corp. v. United States*, 295 U. S. 495 [55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947]; *State v. Hines*, 163 Kan. 300 [183 P. 2d 865].

The rule that the statute must provide a yardstick to define the powers of the executive or administrative officer is easy to state but rather hard to apply. Probably the best that can [998] be done is to state that the yardstick must be as definite as the exigencies of the particular problem permit.

The cases cited by appellant set out a pretty rigid standard. Very broad language can be found in them, but such language must be read in connection with the particular problem under discussion. There are several cases decided by the United States Supreme Court, more recent than those cited by appellant, where the problem is exhaustively discussed and where the principles to be applied are set forth at length. One such case is *Lichter v. United States*, 334 U. S. 742 [68 S. Ct. 1294, 92 L. Ed. 1694], where the court upheld the constitutionality of the Renegotiation Act. Under attack on the ground of unconstitutional delegation of legislative powers to administrative officers, was the section of the statute which provided that cabinet secretaries could renegotiate contracts under which "excessive profits" had been or would be realized, and further allowed the secretary to recover "excessive profits" paid to contractors under the renegotiated contracts. No definition of "exces-

sive profits" was contained in the statute. The court held that the phrase "excessive profits" constituted a sufficient yardstick in view of its context, and because of the administrative practices later incorporated into the act, and the nature of the war power there being employed. Certainly, such a standard is far less definite than the one here employed. In discussing standards upheld in other cases the court stated (p. 786):

"The following, somewhat comparable, legislative specifications are among those which have been held to state a sufficiently definite standard for administrative action:

"'Just and reasonable' rates for sales of natural gas, . . . ; 'public interest, convenience, or necessity' in establishing rules and regulations under the Federal Communications Act, . . . ; prices yielding a 'fair return' or the 'fair value' of property, . . . ; 'unfair methods of competition' distinct from offenses defined under the common law, . . . ; 'just and reasonable' rates for the services of commission men, . . . ; and 'fair and reasonable' rent for premises, with final determination in the courts,"

Another leading case is *Yakus v. United States*, 321 U. S. 414 [64 S. Ct. 660, 88 L. Ed. 834], in which the court held that there was no unconstitutional delegation of power by Congress to the Price Administrator in the Emergency Price Control Act of 1942. Section 1(a) described the general purpose of the act. By section 2(a), the Administrator was authorized to promulgate regulations fixing prices of commodities which [999] "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" when in his judgment, their prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act." The section also provided that "so far as practicable . . . the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 . . . and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability,"

The statute was upheld as providing a sufficient standard. There is much stated in the opinion that is here applicable. At page 423 the court stated:

“Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the Administrator’s permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent wartime inflation and its enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act specified in § 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in § 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.

“The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established.” After distinguishing the Schechter case the court stated (p. 424):

[1000] “The Constitution” as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find

for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework . . .

“Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.”

At page 426 appears the following pertinent illustrations: “The authority to fix prices only when prices have risen

or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act to prevent inflation is no broader than the authority to fix maximum prices when deemed necessary to protect consumers against unreasonably high prices, sustained [1001] in *Sunshine Anthracite Coal Co. v. Adkins*, supra [310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263], or the authority to take possession of and operate telegraph lines wherever deemed necessary for the national security or defense, upheld in *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163 [39 S. Ct. 507, 63 L. Ed. 910, 4 A.L.R. 1623]; or the authority to suspend tariff provisions upon findings that the duties imposed by a foreign state are 'reciprocally unequal and unreasonable,' held valid in *Marshall Field & Co. v. Clark*, supra [143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294]. Other powers mentioned by the court as within the constitutional limitation are set forth on page 427 as follows: ". . . the power to approve consolidations in the 'public interest,' . . .; or the power to regulate radio stations engaged in chain broadcasting 'as public interest, convenience or necessity requires' . . .; or the power to prohibit 'unfair methods of competition' not defined or forbidden by the common law, *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304 [54 S. Ct. 423, 78 L. Ed. 814]; . . .; or the similar direction that in adjusting tariffs to meet differences in costs of production the President 'take into consideration' 'in so far as he finds it practicable' a variety of economic matters, sustained in *Hampton & Co. v. United States*, supra [276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624]; or the similar authority, in making classifications within an industry, to consider various named and unnamed 'relevant factors' and determine the respective weights attributable to each, held valid in *Opp Cotton Mills v. Administrator*, supra [312 U. S. 126, 61 S. Ct. 524, 85 L. Ed. 624]."

The United States Supreme Court has also commented on this problem in *American Power & L. Co. v. Securities & Exch. Com.*, 329 U. S. 90 [67 S. Ct. 133, 91 L. Ed. 103]. The problem there involved and its solution are disclosed in the following quotation (p. 104):

"Section 11(b) (2) itself provides that the Commission shall act so as to ensure that the corporate structure or continued existence of any company in a particular holding company system does not 'unduly or unnecessarily complicate the structure' or 'unfairly or inequitably distribute voting power among security holders.'" The objection that this was an insufficient standard was rejected.

At page 105 the court stated: "... These standards are certainly no less definite in nature than those speaking in other contexts in terms of 'public interest,' 'just and reasonable rates,' 'unfair methods of competition' or 'relevant factors.' [1002] The approval which this Court has given in the past to those standards thus compels the sanctioning of the ones in issue.

"The judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems. The legislative process would frequently bog-down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. . . . Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."

Enough has been quoted to illustrate how similar problems have been handled by the highest court. It is clear that the fact that the commissioner has some discretion, is no valid constitutional objection to the statute. It is also clear that the Assigned Risk Law does not have to be considered in a vacuum. Other statutes in *pari materia* may, of course, be considered. The original Assigned Risk Law with its urgency clause, may be looked to in order to ascertain the legislative purpose. So too, we may properly consider the various statutes requiring insurance or security

from certain automobile drivers. The background of the present statute, the problem it was designed to meet, the voluntary plan, its breakdown, all serve to give meaning and substance to the provisions of the statute under consideration. Thus, when section 11620 of the Insurance Code declares that it is the policy of the law to allow the commissioner to issue a plan for the equitable apportionment of applicants in good faith entitled to insurance, the statute does not stand alone but must be considered in connection with its object and its background. If the statute was to be effective, great discretion had to be left to the commissioner to meet the various and complex problems with which he was to be presented. Rigid standards were not reasonably practicable. While the statute must furnish the administrator with a yardstick, it need not furnish a micrometer. The policy of the statute is clear. In our opinion, the yardstick furnished complies with constitutional requirements.

[1003] Does the Plan Violate the Statute?

The next contention of appellant is that, if it be assumed that the statute is valid, the plan actually adopted violates the provisions of the statute and is therefore void.

The appellant attacks the plan in several minor and one major respect. The first minor attack is against various provisions of the plan on the ground that certain distinctions made therein are arbitrary or discriminatory. None of these alleged discriminations operates against appellant. It is elementary that only a member of the class discriminated against can attack the constitutionality of a plan on the charge of unconstitutional discrimination.

Another minor objection to the plan is the claim that it overlooks consideration of the record of applicants with respect to suspension or revocation of drivers' licenses. (*Ins. Code*, § 11624(a) (2).) However, appellant has apparently overlooked sections 2431.8 and 2431.8a of the plan, which provide that the application may be refused if the accident and conviction records are such that his operation of an automobile would endanger public safety, or if, on the basis of a thorough investigation of the applicant's record,

reasonable doubt exists as to whether the applicant should be permitted to continue driving.

The main attack against the plan is based on the last sentence of section 11621 of the Insurance Code which reads as follows: "In so far as possible, assignments under the plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber."

The plan provides (§ 2445.1) that "In so far as possible, assignments shall be consistent with the scope of territorial operations and underwriting policies of each insurer, of which the Manager shall have been notified in writing. Underwriting policy is policy founded on underwriting judgment of the hazards involved. Without in any way limiting or enlarging the meaning of the term 'underwriting policy,' policy excluding from insurance an applicant solely by reason of the fact of his non-membership in an organization is not underwriting policy. Underwriting policy excluding from insurance applicants solely by reason of facts or circumstances not sufficient to render them not in good faith entitled, under this Plan, to insurance is inconsistent with the purposes of this Plan and of the statute under which it is approved and issued." Appellant argues at length that this provision of the plan is invalid, indefinite and irrational. The argument, omitting certain technical attacks on the provision, none of [1004] which is sound, amounts to this—section 11621 of the Insurance Code requires that any plan adopted shall "In so far as possible" be consistent with the underwriting policies of the insurer. The policy of insuring only members of the California State Automobile Association is an underwriting policy of appellant. The plan (§ 2445.1) declares this not to be an "underwriting policy." The plan therefore violates the statute.

The obvious answer to appellant's argument is that all "underwriting policies" of an insurer do not have to be given recognition by the plan. Section 11621 of the Insurance Code does not compel the commissioner to embody all such underwriting policies into the plan. The language is "In so far as possible" such underwriting policies shall be considered in making assignments. If it be assumed that a policy or practice of writing insurance only for members

of the association is an "underwriting policy," such policy is directly opposed to the purpose, intent and spirit of the statute. Certainly, section 11621 does not require the commissioner to embody into the plan a policy of a particular insurer that is violative of the statute. It is apparent that if membership in arbitrarily selected groups were to be recognized as a proper base of underwriting policy, the way would be open whereby any company could evade legitimate assignments on the ground that the particular applicant was not a member of the selected group. Thus, the entire purpose of the statute would be defeated.

It is apparent that the commissioner cannot have a plan providing for "equitable apportionment" of risks among all insurers unless he has the power to assign to appellant applicants who are nonmembers of the association. Section 2445.1a of the plan provides that when a member of the association applies for insurance under the plan, the member shall preferably be assigned to appellant. However, appellant cannot refuse an applicant merely because he is not a member of the association. This would seem to be as "equitable" an apportionment as is possible without destroying the effect of the statute.

Thus, whether it be considered that the commissioner gave no consideration to appellant's policy of writing insurance only for members of the association, or that he gave such consideration "In so far as possible," the plan does not violate the statute.

The judgment appealed from is affirmed.

Bray, J., and Schottky, J. pro tem., concurred.

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In the Supreme Court of the United States

OCTOBER TERM 1950

No. 310

CALIFORNIA STATE AUTOMOBILE ASSOCIATION
INTER-INSURANCE BUREAU,

Appellant,

vs.

WALLACE K. DOWNEY, INSURANCE COM-
MISSIONER OF THE STATE OF CALIFORNIA.

Brief of Appellant California State Automobile Association Inter-Insurance Bureau

On Appeal from the District Court of Appeal of the
State of California, First Appellate District.

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In the Supreme Court of the United States

OCTOBER TERM 1950

No. 310

CALIFORNIA STATE AUTOMOBILE ASSOCIATION
INTER-INSURANCE BUREAU,
Appellant,

-VS.

WALLACE K. DOWNEY, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA.

Brief of Appellant California State Automobile Association Inter-Insurance Bureau

On Appeal from the District Court of Appeal of the
State of California, First Appellate District.

OPINION BELOW

The opinion of the court below (R. 170) is reported in 96
C.A.2d 876 and in 216 Pac. 2d 882.

JURISDICTION

This is an appeal from the District Court of Appeal of the
State of California, First Appellate District.

On November 13, 1950, this Court noted probable jurisdiction (R. 211).

Jurisdiction is invoked under Title 28 *U.S. Code*, Section 1257(2), which permits an appeal to this Court from a final judgment "rendered by the highest court of a State in which a decision could be had" where the validity of a state statute has been questioned as repugnant to the Constitution of the United States, and the decision is in favor of its validity.

The suit was one to annul an order of the Insurance Commissioner of California which deprives appellant of the right to do business. That decision is based on a California statute which appellant has assailed as being repugnant to the Fourteenth Amendment. The judgment of the court below upheld the statute.

The judgment was entered April 10, 1950 (R. 203). A petition for rehearing was filed April 25 and denied May 10, 1950, and a petition for hearing by the state Supreme Court was filed May 19 and denied June 8, 1950 (R. 203, 204).

Petition for appeal to this Court was presented to the District Court of Appeal and allowed on August 3, 1950 (R. 205).

The District Court of Appeal had jurisdiction to grant a rehearing within 30 days of its decision, on petition filed within 15 days. The state Supreme Court had jurisdiction to grant a hearing within 60 days of the decision on petition filed within 40 days. (Cal. Constitution, Art. VI, Sec. 4, 4(b) and (c); Rules 27(a), (b), and 28 of the Rules on Appeal issued by the California Judicial Council under authority of California Code of Civil Procedure, Section 961).*

The appeal is therefore timely. Title 28 *U.S.C.*, Sec. 2101(c); *Market Street Railway Co. v. Railroad Commission of California*,

NOTE: References to the printed record appear thus: (R.). All emphasis in quotations is added, unless otherwise stated.

*The full text of these provisions is set out in Appendix III to this brief.

324 U.S. 548; *American Railway Express Co. v. Levee*, 263 U.S. 19; *Department of Banking v. Pink*, 317 U.S. 264, 266; *Chicago G.W.R.R. Co. v. Basham*, 249 U.S. 164.

The judgment of the District Court of Appeal is that of the highest California court in which a decision could be had, since no appeal lies from its decisions to any other state court, and the state Supreme Court declined to exercise its discretionary power to grant a hearing. The judgment of the District Court of Appeal is therefore the judgment to be reviewed. *American Railway Express Co. v. Levee*, supra; *Sullivan v. Texas*, 207 U.S. 416.

In addition to the statute, there is involved a "plan" promulgated by the Insurance Commissioner of California under authority of the statute. Within the meaning of Title 28 U.S.C., Section 1257(2), this "plan" is a statute of the state. *Hamilton v. Regents*, 293 U.S. 245, 258; *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 300.

QUESTION PRESENTED

Where a cooperative has set up an inter-insurance exchange or reciprocal by which members may insure each other against automobile accident liability, where the reciprocal has never insured non-members of the cooperative and the practice of insuring only members has constituted the reciprocal's basic policy since its inception years ago and the foundation of its existence, may a State, without violating the due process clause of the Fourteenth Amendment to the United States Constitution, compel it against its will to issue insurance to non-members of the cooperative and thereby subject each participant in the reciprocal to the damage liabilities of the unwanted risks, particularly where the risks are so hazardous that no insurer will accept them voluntarily?

Is a California statute—the Assigned Risk Law—which empowers the State Insurance Commissioner to issue a Plan compelling such a reciprocal to insure non-members, and is the Plan

promulgated by the Commissioner under authority of the law, constitutional under the Fourteenth Amendment?

And does an order of the Commissioner depriving the reciprocal of the right to do business for refusal to subscribe to and participate in the Plan deprive it and its members of property and liberty without due process?

STATUTES INVOLVED

The statute primarily involved is the *California Assigned Risk Law* (Cal. Stats. of 1947, Ch. 39, p. 525, as amended, Stats. of 1947, Ch. 1205, p. 2714; Sections 11620-11627, California Insurance Code). The material portions are:

Insurance Code, Sec. 11620:

"The [insurance] commissioner, after a public hearing, shall approve or issue a reasonable plan for the equitable apportionment, among insurers admitted to transact liability insurance, of those applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods. . . . All such insurers shall subscribe to the plan and its amendments and, subject to Section 11621, participate therein."

* * * * *

Sec. 11621:

" . . . In so far as possible, assignments under the plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber."

Sec. 11625:

"If an insurer admitted to transact liability insurance fails to subscribe to the plan or to any amendments thereto, the commissioner shall give 10 days' written notice to such insurer to so subscribe. If such insurer fails to comply with such notice, then the commissioner may, after hearing upon notice, suspend the certificate of authority of such insurer to transact liability insurance in this State until such insurer does so subscribe. . . ."

Sec. 11627:

"In this article, 'insurer' includes reciprocal or inter-insurance exchanges."

This statute is set out in full in Appendix I to this brief.

Secondarily involved is the *California Assigned Risk Plan* issued by the Insurance Commissioner of California under the authority of the Assigned Risk Law (Cal. Administrative Code, Title 10, Sec. 2400-2498).

The material portions are:

Sec. 2405:

"Subject to the provisions of Section 11621 of the Insurance Code and Section 2449 of this Article, every insurer admitted to transact liability insurance shall participate in this Plan."

Sec. 2445.1:

"... Without in any way limiting or enlarging the meaning of the term 'underwriting policy,' policy excluding from insurance an applicant solely by reason of the fact of his non-membership in an organization is not underwriting policy. ..."

Sec. 2445.15:

"In the assignment of a risk when the applicant is a member of a Motor Club . . . preference shall be given to an insurer which confines its underwriting of risks not subject to the Plan to members of such Motor Club. . . . No such insurer may refuse to accept an assignment because the applicant is not a member of such Motor Club. . . ."

This plan is set out in full in the printed record (R. 10-32, 54).

STATEMENT OF THE CASE**A. Identity and Nature of Appellant.**

Forty-four years ago California State Automobile Association* was formed as a motor club or cooperative of citizens selected for their interest in motoring to advance the interests of the motoring public. By 1914 a new want of its members was pressing for attention. Insurance rates were high and unsatisfactory. Consequently, the Association then "created appellant . . . in order to offer to its membership a plan of automobile insurance at a lower cost than the then prevailing rates" (R. 171).

Appellant is not a legal entity, although the law permits it to sue in a common name (Cal. Ins. Code, Sec. 1450). It is not organized for profit. It is a group of drivers banded together to insure each other and thus to keep down the cost of their own insurance. Each participant gives a power of attorney to a common agent to enter into reciprocal agreements of insurance and merely pays his share of the losses.

As stated in the opinion of the court below, "Obviously, it provides for a form of cooperative insurance by means of a joint venture or limited partnership." (R. 172.)

More specifically, appellant

"is a reciprocal or inter-insurance exchange. It is open only to members of the Association. Its executive body, called the 'Insurance Board' is elected by the Board of Directors of the Association, and is composed of the same number of members as the board of directors of the Association. Participation by the members of the Association is voluntary. Each member desiring to join the Bureau executes a power of attorney to the same agent, authorizing him or it to enter into agreements of insurance. The members act as insurers of one another. No premiums, as such, are paid. Each member makes an annual deposit which is credited to him. The deposit fund is used to pay losses and expenses, for which pur-

*Hereafter called the Association.

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poses a proportionate amount is deducted from the deposit of each member." (R. 172)

Unused portions of the deposit are refunded (R. 117, 123, 131).

As used through this brief, the term "appellant" therefore refers to the reciprocal and all its participants, who are called subscribers.

Ever since its organization it has been appellant's basic underwriting policy that only members of the Association are eligible to participate.

The case comes here upon the following express finding of fact:

"That petitioner was formed and organized in the year 1914, solely for the purpose of making insurance available to, and has in practice limited its insurance coverage to 'Members of the California State Automobile Association or corporations or firms in which such members are officers or partners,' and has at all times thereafter existed solely for that purpose, and it has continued this practice in force. . . . From its inception it has at all times been and it is petitioner's basic policy that only members in good standing of the California State Automobile Association or corporations or firms in which such members are officers or partners shall be eligible to apply for insurance in petitioner." (R. 43, 44)

Appellant has not insured all members of the Association and has rejected those whose risks it regarded as undesirable (R. 74, 75). But it has never insured a non-member.

The basic charter or constitution of an insurance reciprocal is the power of attorney which each participant gives to the common attorney in fact (Cal. Ins. Code, Sec. 1307). This power of attorney must be filed with the Insurance Commissioner (Sec. 1320).^{*} The power of attorney adopted by appellant on its crea-

^{*}The sections of the Insurance Code showing the nature and character of a reciprocal are set out in Appendix II to this brief.

tion in 1914 and the powers of attorney used ever since have provided that they are "subject to all the limitations, modifications and restrictions contained in the rules and regulations of the Insurance Board of the California State Automobile Association Inter-Insurance Bureau." The very first rule of the rules adopted in 1914 provided that "Only members in good standing of the California State Automobile Association, or corporations or firms in which such members are officers or partners may be eligible to apply for insurance in the Bureau." A similar rule has always been in effect (R. 57-64, 111, 112A, 113, 118A, 124, 125, 126A, 132, 134, 134A).

These rules were adopted because the Association wished "to furnish to our members, and to our members only, insurance at a reduced price if possible and under better conditions than could be obtained in the local market, and as we were not organized for profit we could not see the desirability of taking in any but our own members" (R. 72).

Every person who has participated in exchange of insurance contracts through appellant during its existence has signed the prescribed power of attorney (R. 97, 98).

B. The Statute Involved, Its Genesis and Nature.

On February 17, 1947, the State of California enacted the Assigned Risk Law (Cal. Stat. 1947, Ch. 39, p. 525). It contained two sections. The operating clause (Sec. 1) read:

"After consultation with insurers admitted to transact automobile bodily injury liability insurance, the [Insurance] commissioner shall approve a reasonable plan for the equitable apportionment among such insurers of applicants for automobile bodily injury and property damage insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods and, when any such plan has been approved, all such insurers shall subscribe thereto and shall participate therein. Any applicant for such insurance, any person insured under such a plan

and any insurer affected may appeal to the commissioner from any ruling or decision of the manager or committee designated to operate such plan.

"In this section, 'insurer' includes reciprocal or interinsurance exchanges."

Before anything was done under the Act it was amended in June, 1947. The relevant provisions of the law as amended are quoted at pp. 4, 5, *supra*, but the amendment did not change the essential nature of the act.

The heart of the statute is that it empowered the Insurance Commissioner to issue a plan compelling insurers to enter into contracts of insurance with those whom they do not wish to insure, commanded insurers to subscribe to the plan, and empowered the Commissioner to deprive any insurer who refused to subscribe of the right to do business.

GENESIS OF THE STATUTE.

The genesis of the statute is disclosed by Section 2 of the original act.* That section contained the following recital:

"Under provisions of the Vehicle Code, certain persons who have been involved in motor vehicle law violations are required to file insurance policies or other evidence of financial responsibility with the State in order to continue lawfully to operate motor vehicles upon the public highways of the State.

"Because insurers are naturally reluctant to grant insurance to such persons, it has been necessary to devise a plan for allocating such risks upon an equitable plan to the insurers engaged in the business. Such a plan, dependent upon the voluntary consent of all insurers, has been in effect for

*That section was an "urgency" clause designed to bring the Act into immediate operation. Otherwise its effective date would be deferred until 91 days after the close of the legislative session. Cal. Government Code, Sec. 9600; Cal. Constitution, Art. IV, Sec. 1.

a number of years, but has recently ceased to operate because of the withdrawal of one of the subscribing insurers."

This recital mentions a voluntary plan and states the reason for the enactment to be the withdrawal of one of the participants. That participant was appellant. The plan had been adopted by insurers in 1942 and was in effect until January 1947 (R. 87).^{*} Commercial insurers feared that unless they provided insurance for all those who wished to obtain it, the State would enter the field to supply the want and, once it had done so, would extend its service generally and become a competitor. The voluntary plan for the assignment of bad risks was adopted to forestall such state competition. Appellant participated, but it strictly adhered to its fundamental policy of insuring only members of the Association. It withdrew at the end of 1946.

These facts are epitomized in the opinion of the court below (R. 174, 175):

"... various solutions were offered to the Legislature, one of which was that the State go into the insurance business and assume these and other risks. This was a solution opposed and feared by the insurance companies. Faced with these various pressures, in 1942, all insurance companies, handling automobile insurance in California, including appellant, adopted a voluntary 'assigned risk' plan, which provided a method for insuring some, but not all, of the groups that were unable, otherwise, to secure insurance . . .

* * * * *

"Appellant . . . was a subscriber to the voluntary plan, but all during the time it participated it adhered, strictly, to its policy of insuring only members of the California State Automobile Association, some of whom were members of the restricted groups. Late in 1946 or early in 1947, appellant withdrew from the plan. . . . The other insurers were reluctant to continue the voluntary plan under such

^{*}The voluntary plan appears at R. 152-166.

circumstances. In this emergency the Legislature, then in session, promptly acted. It passed, as an emergency measure, the Compulsory Assigned Risk Law. . . ."

To this recital may be added that the Legislature acted at the request of the commercial insurers. It was they who proceeded to the legislature upon appellant's withdrawal from the voluntary plan and with lightning speed obtained enactment of the law (R. 106).

Since appellant was not in business for profit, it was not its concern whether the State entered the insurance field. The law was enacted at the behest of commercial insurers for profit and was aimed at appellant.

THE ASSIGNED RISK PLAN.

Following the enactment of the statute, an assigned risk plan was proposed by the automobile insurers, and in October, 1947, the Insurance Commissioner held a hearing on it (R. 178). He promulgated the Assigned Risk Plan in December, 1947 (R. 54).

In the litigation below appellant made two contentions in addition to that now presented to this Court. These must be briefly de-

*Cf. Best's Insurance News (Fire & Casualty Edition, March, 1948, p. 31):

"The statement is being made more and more frequently that there is an obligation upon the part of the companies to provide insurance for all who wish to buy it, and failing to do so, we will be faced with state or government insurance."

The same fear was expressed even more clearly in another article dealing with assigned risk plans, in the same publication, September, 1948 (p. 55):

"If the industry fails to voluntarily provide an adequate insurance market to meet public needs we lose much of the defense, otherwise available, when agitation for a state insurance fund develops. We must recognize the tendency for government to absorb formerly private industry and as a rate regulation and supervision progresses and additional personnel becomes trained it will become an increasingly narrow step from supervision of the insurance business to actual operation."

scribed, since the decision of the court below on these points enters into the construction and terms of the statute.

When the statute was amended in June, 1947, a section was added which, appellant contended, gave it some relief. That section (Ins. Code, Sec. 11621) provided that "In so far as possible, assignments under the plan shall be consistent with . . . underwriting policies of each subscriber." Since appellant's basic policy was to insure only members of the Association, it urged that the statute did not authorize a plan which compelled it to insure non-members.

At the hearing called by the Insurance Commissioner to consider the plan proposed by insurers' committee,

"Appellant appeared . . . and attacked the constitutionality of the Assigned Risk Law, but also stated that it would give consideration to accepting the plan voluntarily if the proposed plan were modified so as to give recognition to appellant's policy of insuring only members of the California State Automobile Association. This condition was not acceptable to the Commissioner nor to the committee." (R. 178)

The Insurance Commissioner wrote into the plan two provisions which expressly negated appellant's contention. One (Sec. 2445.1) stated that "policy excluding from insurance an applicant solely by reason of the fact of his non-membership in an organization is not underwriting policy." The other (Sec. 2445.15) stated that "No . . . insurer may refuse to accept an assignment because the applicant is not a member" of a motor club to members of which the insurer confines its underwritings. (R. 21).

In the subsequent proceedings appellant contended that the plan was not authorized by the statute.* But appellant's construction of the statute was rejected by the court below (R. 200-

*The construction of the statute urged by appellant would have obviated the constitutional question now presented to this Court, and that consideration was pressed below.

203). The statute has thus been construed as authorizing a plan which commands the appellant—a reciprocal whose basic policy and uniform practice have always been to limit participation to members of the Association—to admit non-members; that is to say, it would compel members of the Association who desire to enter into reciprocal contracts of insurance with one another to enter into such contracts with non-members as well.

As the case comes before this Court, the statute must be read as if this construction had been written into it by express language. *Winters v. New York*, 333 U.S. 507, 514; *Stephenson v. Binford*, 287 U.S. 251, 267.

The second contention was that the statute was void under the California Constitution as an improper delegation of legislative power to the Commissioner. The statute does not prescribe what persons insurers must insure but merely authorizes the Commissioner to issue a plan for the apportionment, "among insurers . . . of those applicants . . . who are in good faith entitled to but unable to procure such insurance through ordinary channels" (see p. 4, *supra*). The only standard for the guidance of the Insurance Commissioner in determining what persons insurers should be compelled to insure is to be found in the words "in good faith entitled." These words, appellant contended, leave the determination in the uncontrolled, arbitrary, and subjective consciousness of the Commissioner.

The court below rejected this contention. It held the statute to be a valid delegation of legislative power and the plan a valid exercise of that power (R. 194-200). By virtue of that decision the Assigned Risk Plan must be treated as an exercise of the power of the State of California. *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612, 613.* The Assigned Risk Plan and the Assigned Risk Law together constitute the statute of the State

*Similarly, *Hughes v. Superior Court*, 339 U.S. 460, 466; *International Brotherhood of Teamsters etc. v. Hanko*, 339 U.S. 470, 479 and cases cited.

whose constitutionality is now before this Court for review. *Hamilton v. Regents*, 293 U.S. 245 at 258; *Dabnke-Walker Co. v. Bondurant*, 257 U.S. 282, 300.

**CHARACTER OF THE RISKS WHICH THE STATUTE
COMPELS INSURERS TO ASSUME.**

The contracts forced upon insurers against their will are bad contracts; the risks which it compels them to insure are all abnormal and of such a hazard that no insurer will accept them voluntarily.

This fact is confessed by the statute itself. The "urgency clause" of the statute enacted in February, 1947, referred to "persons who have been involved in motor vehicle law violations" and stated that it was necessary to create a plan of compulsory assignment of risks "because insurers are *naturally* reluctant to grant insurance to such persons" (quoted p. 9, *supra*).

And as testified by the Insurance Commissioner's chief witness, the Manager of the Plan, "a risk is an assigned risk, necessarily comes to the Assigned Risk Plan, because it is not a normal risk"; "risks under the Assigned Risk Plan are contrary to the underwriting policies of the insurer or they couldn't come through the Assigned Risk Plan at all" (R. 96). By "underwriting policy" the witness meant a policy of not underwriting bad hazards (R. 95). Again, "risks that come through the Assigned Risk Plan are of such a hazard in nature that insurers will not accept them voluntarily" (R. 96).*

*In a review of the instant case in "Survey of California Law, 1949-1950" (College of Law, University of Santa Clara), p. 108, it is said that the risks are those who have been in accidents and such as "are usually considered to be substandard or bad risks."

Statistical evidence on the subject was offered by appellant at the administrative hearing but was rejected (R. 81, 86, 90, 92, 98-101). California law provides that on review of administrative hearings the court may consider rejected evidence if it should have been admitted. *Cal. Code of Civil Procedure*, Sec. 1094.5(b). Since the plan went into effect on January 19, 1948 (R. 11) and the hearing was held on March 5, 1948 (R. 51), the proffered statistics compare appellant's loss experience

C. The Proceedings Below; the Raising of the Constitutional Issue.

At the hearing called by the Insurance Commissioner in October, 1947, to consider a plan, appellant appeared and attacked the constitutionality of the statute (see p. 12, *supra*). When the plan was thereafter promulgated, appellant refused to subscribe to it.

In February, 1948, the Commissioner instituted proceedings before himself to suspend appellant's right to do business (R. 107-110). An administrative hearing was held on March 5, 1948 (R. 51). At the outset appellant objected thus:

"The Statute under which this Plan which has just been placed in evidence as Exhibit 2 was issued and approved by the Insurance Commissioner is unconstitutional . . . because it deprives persons, and particularly this Respondent and its members, of property without due process of law; and likewise, deprives them of liberty without due process of law. And for that reason it violates the Fourteenth Amendment to the United States Constitution, and particularly, the Due Process Clause thereof." (R. 55)

On March 19, 1948, the Commissioner issued an order suspending appellant's right to transact automobile liability insurance business in California because of its refusal to subscribe to the plan (R. 6, 9, 43).

The California Administrative Procedures Act prescribes that decisions of administrative agencies may be judicially reviewed on

with that of insurers under the voluntary Assigned Risk Plan. In the period 1942 through 1945 appellant's loss ratio was only 50% (R. 98). That of all insurers on risks coming through the voluntary Assigned Risk Plan was 80% (R. 86, 101). Moreover, the risks insured by appellant which entered into its 50% ratio were normal and carried the ordinary charge (R. 100), but those written through the voluntary Plan and entering into the 80% figure were so bad that they averaged a premium of 140% of normal (R. 88, 89, 92). If the premiums had been comparable to those received by appellant, the loss ratio would have been well in excess of 100%, since loss ratio is a fraction of which the numerator is the losses and the denominator the premiums.

a petition for a writ of mandate.* On March 22, 1948 appellant filed in the Superior Court of the State of California in and for the City and County of San Francisco such a petition to annul the Commissioner's order (R. 1). The petition asserted in paragraph 7 (R. 3):

"Said statute [Assigned Risk Law] purports to require insurers to issue insurance and accept risks against their will, and said statute, and the aforesaid plan purported to have been issued thereunder, and the decision of the Insurance Commissioner hereinabove referred to are and each of them is unconstitutional and void and violates each of the following provisions of the Constitution of the United States:

"(a) The 14th Amendment as constituting a law depriving persons, and particularly your petitioner and its members, of property and liberty without due process of law."

In the Opening Statement in the Superior Court appellant said (R. 170):

"... We do, of course, claim the statute is unconstitutional in requiring an insurer to cover anybody it does not desire to insure, but the point with respect to our petitioner is that it compels us to insure others than members of the California Automobile Association. In other words, our organization was a cooperative organized for the purpose of insuring members of the association and no others"

On September 29, 1948, the Superior Court, although finding all facts in appellant's favor, denied the petition for writ of mandate (R. 47) and held

"that neither said statute nor said plan is invalid by reason of conflict with any provision of the Constitution of the State of California or of the United States." (R. 46)

*Government Code, Sec. 11523: "Judicial review may be had by filing a petition for writ of mandate in accordance with the provisions of the Code of Civil Procedure. . . ."

Code of Civil Procedure, Sec. 1094.5. "[Inquiry into validity of administrative order or decisions.]

* * * * *

"(e) The Court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. . . ."

An appeal was taken to the District Court of Appeal. That court states in its opinion (R. 181):

"Appellant directs its main arguments against sections 11620 and 11627 of the Insurance Code, contending that, for various reasons, those sections deny to it due process of law in violation of the Fourteenth Amendment to the United States Constitution.

* * * * *

"... It is then argued that, even if the insurance business were subject to the same degree of control as a public utility, appellant cannot be compelled to accept non-member risks because appellant has heretofore restricted its operations to contracting only with members of the California State Automobile Association. Thus, it is contended, appellant is not a public insurer, and cannot be compelled to serve others."

On April 10, 1950, the District Court of Appeal affirmed the judgment. It held that "There is . . . no violation of the due process clause" (R. 193).

Appellant has continued in business by virtue of successive orders of the courts staying the Commissioner's order of suspension pending final judgment in the cause.

SPECIFICATION OF ASSIGNED ERRORS URGED

The assignments of error are set out in the record (pp. 207, 208). The District Court of Appeal erred

1. In holding that the California Assigned Risk Law (Cal. Stats. of 1947, Ch. 39, p. 525, as amended, Stats. of 1947, Ch. 1205, p. 2714; Sec. 11620-11627, Cal. Insurance Code), insofar as it compels, or empowers the Insurance Commissioner of the State of California to compel, petitioner and appellant and its members, against their will, to insure non-members of California State Automobile Association, does not violate and is not repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2. In holding that the California Assigned Risk Plan (Cal. Administrative Code, Title 10, Sec. 2400-2498), promulgated by the said Insurance Commissioner under authority of the said Assigned Risk Law, insofar as it compels petitioner and appellant and its members, against their will, to insure non-members of California State Automobile Association, does not violate and is not repugnant to the due process clause of said Fourteenth Amendment.

3. In holding that the said Insurance Commissioner could and did validly and without violating said Fourteenth Amendment suspend the certificate of authority of petitioner and appellant to transact automobile liability insurance in California for failure to subscribe to said Assigned Risk Plan.

4. In failing to order, adjudge and decree that the decision of said Insurance Commissioner, made March 19, 1948, suspending petitioner and appellant's certificate of authority to transact automobile liability insurance in California, until it should subscribe to said Assigned Risk Plan, is invalid and void and should be annulled and set aside, as violating the said Fourteenth Amendment, and affirming the judgment of the Superior Court of the State of California in and for the City and County of San Francisco denying said petitioner and appellant's petition for writ of mandate to annul and set aside said decision of the Insurance Commissioner.

SUMMARY OF THE ARGUMENT

I.

The statute has three effects: (1) It commands insurers to enter into contracts against their will; (2) those contracts are abnormal and of such a hazard that no insurer will accept them voluntarily; (3) by compelling appellant to insure non-members of the Association, the statute forces it to change its basic nature as a cooperative and foists unwanted partners on its participants. In effect it compels careful drivers to pay damage judgments rendered against the reckless and uninsured.

Thereby it runs counter to several deep seated feelings: (1) That it is an inherent right of every man to refuse to deal with any person; as a particular instance, that an insurer is free to reject an application for any reason; and (2) that the law cannot make one another's partner without his consent. The statute also runs counter to freedom of association.

While the principles to be discussed may justify the conclusion that no insurer can constitutionally be compelled to insure an undesired risk, we present a narrower issue, whether a non-corporate cooperative organized solely to insure members of a specific group and always confining itself to that group may be forced to insure non-members.

In a broader aspect the issue is whether the power of the state over its citizens has now become so free of constitutional restraints that the state may compel natural persons to devote their property to public functions and to convert their free associations into organs of the state.

The court below concedes that the statute would have had to be declared unconstitutional a few years ago but relies on some new spirit. Basically its position rests on no decided case but on a political theory that state power must be unhampered. But the political philosophy on which the republic was founded is that there are some natural rights that no government may impair. This philosophy is embodied in the Due Process Clauses. Due process expresses all those rights that courts must enforce because they are basic to our free society. What they are is determined by the process of pricking out a line from case to case. For the issue in this case such a line has already been pricked out. The statute is on the wrong side of the line, and reason and sound policy require that it remain so. The recent developments in constitutional law do not support this statute. Appellant stands at the last barrier separating legislative power constitutionally restrained from legislative power subject to no restraint at all.

II.

Every decision in a controverted case directly bearing on the issue shows that a statute may not constitutionally compel one to insure another unwillingly. *National Union Fire Ins. Company v. Wanberg*, 260 U.S. 71; *Employers Liability Assurance Corporation v. Frost*, 48 Ariz. 402, 62 P.2d 320.

III.

The court below waves aside settled law by arguing that with *Nebbia v. New York*, 291 U.S. 502, this Court drastically expanded the immunity of the police power from the due process clause. Important as *Nebbia* was, its rationale does not go so far as to support the statute. What *Nebbia* held was that the degree to which business is subject to *regulation* does not depend, as was formerly supposed, on whether it is "affected with a public interest." It thereby merely subjected all business to the same power of regulation to which insurance was already subject.

Even regulation, if "it goes too far" violates due process. And an abyss separates regulation, however broad, from compulsion to serve or to contract. It has been elementary law that the fact that a business may be regulated for the public good does not imply that it can be compelled to serve the public.

The power to regulate, as expounded in *Nebbia* and later cases, is the power to prevent use of property to the detriment of others, prescribe the terms that will enter into a contract if one chooses to make the contract, prohibit injurious practices, impose standards of right conduct, suppress business and industrial conditions offensive to public welfare, curtail the area in which one may contract. But none of this comprehends power to compel one to contract.

A duty of compulsory service rest on public utilities, but it has always been held that to compel one not a public utility to enter into contracts against its will is a violation of due process. The cases since *Nebbia* continue to recognize this basic principle. They

also continue to recognize that the validity of regulation and of compulsion to serve present different problems.

IV.

The court below would extend the rule applicable to public utilities to the insurance business. This goes well beyond *Nebbia*. But it does not answer the issue appellant presents.

The essence of the public utility rule is that when one has voluntarily offered to deal with the public generally, he may not discriminate within the scope of his voluntary dedication. It is a rule against discrimination, not an extension of the scope of the party's offer. If he has not offered to deal generally with the public, he cannot be compelled to do so. The cases are legion that "consistently with the due process clause of the Fourteenth Amendment" a private utility may not be converted into a public utility by legislative fiat. On similar principles, a public utility cannot be compelled to serve beyond the limits of its voluntary dedication.

These principles have been applied with particular solicitude to protect cooperatives from being compelled to serve non-members.

If it be said that insurers engaged in business for profit have already offered to do business with the public generally and, by analogy to public utilities, may be compelled to serve within the full ambit of that offer, such argument can have no relation to appellant. The scope of its activities, the extent of its offer, the ambit of its dedication have been to serve only members of the Association.

The court below argues that appellant's dedication is to be measured by the powers general law would permit it to have and not by the admitted fact that it has always confined its insurance to a limited group. This is contrary to settled constitutional law. The extent of one's dedication is measured by a fact: whom has it held itself out as ready to serve? A corporation's charter may empower it to carry for the public generally; yet if it has never done

so or offered to do so, it may not be compelled to do so. The "important thing is what it does, not what its charter says."

Moreover, while California law permits reciprocals to be organized to insure everyone, appellant was not so organized. A particular reciprocal is limited by its power of attorney. Appellant's power of attorney has always limited insurance to members of the Association.

A state's power over corporations is no measure of its power over others.

V.

The court below finally admits that "no company can be compelled to assume a risk," but asserts that "if it refuses to accept an assigned risk, its right to do business in this state may be terminated."

But a lawful power of a state—even the power to grant or deny a privilege—cannot be exercised as an instrument to accomplish an unconstitutional result. A state is not permitted "to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it." Unless appellant can be compelled to insure non-members, it cannot be deprived of the right to do business for refusal to accept such risks.

The authorities, announcing this doctrine of unconstitutional conditions, limit a state's power to deny a privilege. *A fortiori*, they apply here, for appellant's right to do business is not a privilege derived from the state, appellant being merely a name in which individuals contract with each other. While that right may be regulated or limited, California has expressed no public policy against reciprocals. The deprivation of the right to do business is here a penalty for refusal to succumb to an unconstitutional imposition.

VI.

No decided case sustains the statute here assailed. The court below relied on a Massachusetts opinion and certain Texas cases.

In none of the Texas cases was the constitutional question involved, presented, argued or discussed. They contain dicta only.

The Massachusetts opinion was merely an advisory opinion to the legislature, arising outside of any factual controversy and given without benefit of argument of counsel. Moreover, it was expressly confined to corporations, whose charters were issued subject to the Massachusetts constitutional provision that the state may alter corporate rights or duties at will. The court did not deal with the unique facts and issue of the present case, which relate to an insurer non-corporate and created and dedicated to insure a specified group.

Even as so limited, the statute was said by the court to go to the verge of power, and later decisions of this Court discredit the reasoning of the opinion.

VII.

Because of the increase in automobile accidents and the public policy that the right to drive should be conditioned on possession of insurance or other financial responsibility, the court below concludes, with dubious logic, that public policy requires insurance to be made available to inferior drivers whom no one will insure voluntarily.

Granting that the legislature may declare such a public policy, it cannot be fulfilled at private cost but must be at public cost, as, for example, by a state insurance fund or taxation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (Holmes, J.); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (Brandeis, J.).

This case involves no issue of racial discrimination. The validity of anti-discrimination statutes rests on different considerations.

ARGUMENT**I.****The Effect of the Statute, the Issue Defined:
Preliminary Considerations**

The statute whose constitutionality we assail has three significant consequences:

1. It commands insurers to enter into contracts and to incur liabilities against their will.

2. The contracts forced upon the insurer against his will are bad contracts, the risks abnormal, from which financial loss may be expected (see p. 14, *supra*). The court below has sought to support the statute on the basis of public policy in requiring automobile drivers to be financially responsible.* In passing on the state Financial Responsibility Law, the state Supreme Court recently pointed out that "The compelling public interest here appears from the obvious carelessness and financial irresponsibility of a substantial number of drivers" and that the statute was justified by the fact that it applied to the "culpable," those against whom it is probable that judgments for negligence would be rendered. *Escobedo v. State of California*, 35 Cal.2d 870, 876, 878, 222 Pac.2d 1.

3. The statute, by compelling appellant to accept as subscribers those not members of the Association, forces it to alter its type of operations radically, to rewrite the terms of its existence, to violate its basic charter, and to cease to be what it was designed to be and always has been, a self-help cooperative.

As the court below recognizes, appellant is a form of partnership (p. 6, *supra*). Yet the statute foists on partners other and unwelcome partners.

Taking these three effects of the statute together, the statute is seen to be, in essence, the same as one which prescribes that after a judgment should be rendered for damages against an uninsured driver, that judgment should be paid prorata by careful drivers.

*To that argument we address ourselves at pp. 66 et seq. below.

At the threshold the statute runs counter to a deep seated feeling, often expressed as a principle, that "it is the inherent and inalienable right of every man freely to deal or refuse to deal with his fellow men"* and "to refuse . . . to deal with, any man or class of men as he sees fit."† This Court, in *Federal Trade Commission v. Raymond Bros.-Clark Co.*, 263 U.S. 565, 573, referred to this as a "right, 'long recognized'." The statement is frequently repeated. E.g., in *Brosious v. Pepsi-Cola Co.*, 155 F.2d 99, 102 (3 Cir.); *United States v. Colgate & Co.*, 250 U.S. 300.

The great Judge Cooley called it a "civil right" (2 Cooley on Torts (4th ed.), Sec. 224, p. 178):

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern."

This passage is quoted approvingly from an earlier edition of Cooley in *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, 49 (2 Cir.),‡ and is cited with approval by this Court in *Federal Trade Commission v. Raymond Bros.-Clark Co.*, supra, at 573.

*12 Am. Jur. 641, quoted in *Lamont Building Co. v. Court*, 70 N.E.2d 447, 147 Ohio St. 183 (1946).

†*Overland P. Co. v. Union L. Co.*, 57 Cal. App. 366, 207 Pac. 412.

‡The opinion in that case concludes, "We have not yet reached the stage where the selection of a trader's customers is made for him by the government."

This deep-seated feeling is reflected in the Defense Production Act of 1950: "Nothing in this title shall be construed to require any person to sell material or service, or to perform personal services." (Act of Sept. 8, 1950, c. 932, Sec. 406; 64 Stat. 807; 50 U.S.C., App., Sec. 2106.) The statute twice states the intention of Congress to proceed within the framework and with full consideration and emphasis on the maintenance of the "American system of competitive enterprise." (Secs. 2, 401; 50 U.S.C. App. Secs. 2062, 2101.) Similarly the Robinson Patman Act prescribes that nothing in it "shall prevent persons * * * from selecting their own customers in bona fide transactions and not in restraint of trade." (Act of June 19, 1936, c. 592, Sec. 1; 49 Stat. 1526; 15 U.S.C. Sec. 13 (a).)

Of course, the right to refuse to deal, like other rights, may not be used to restrain trade or create an unlawful monopoly.

As applied to the field of insurance, this right has been expressed in the elementary principle that "An insurance company is not bound to accept an application or proposal for insurance but may reject it for any reason. . . ." *K. C. Working Chemical Co. v. Eureka Security F. & M. Ins. Co.*, 82 C.A.2d 120, 131, 185 Pac.2d 832, and cases there cited.

The statute destroys that principle.

In its second, and especially in its third consequence, the statute runs counter to a still more fundamental feeling. As said by Chief Justice Marshall in *Winship v. United States Bank*, 5 Pet. (U.S.) 529, at 560: ". . . the liability of a partner arises from pledging his name. . . . No man can be pledged but by himself." It has often been said that the law cannot make one a partner of another without his free consent. *Karrick v. Hannaman*, 168 U.S. 328; *London Assurance Company v. Drennen*, 116 U.S. 461, 472.

Until now no state has sought to foist a partner upon another. Until now perhaps the only recorded instance of such conduct was to be found in Hitler Germany in the so-called "Aryanization of Jewish property."

Yet the present statute, in compelling appellant to assume liability for the negligence of non-members, has that effect.

In the discussion that follows many of the principles on which we rely may support the conclusion that the statute is unconstitutional in compelling any insurer to insure any undesired risk. But the issue we ask this Court to decide is not so broad.

We do not present the issue as respects corporations writing insurance.* We do not even present the issue as respects reciprocals or other non-corporate insurers engaged in business generally and for profit.

The appellant is a reciprocal organized solely to insure members of the Association. This was the reason for its birth, its

*Different considerations may apply to corporations. See pp. 34, 55 *infra*.

policy, and its undeviating practice (see pp. 6, 7, *supra*). It is a non-profit cooperative of individuals confining their reciprocal assumption of liabilities, their exchange of contracts, within a limited group.

The issue we present is whether appellant, so created and so existing, may constitutionally be compelled to assume liabilities of those outside the group which it was organized to serve—whether individuals who have banded together to insure each other may be compelled to insure outsiders.

We submit that the constitutionality of the statute in its application to appellant is governed by the same principles as a statute which should require a fraternal order such as the Masons or the Knights of Columbus to insure non-members if it wished to provide a system of life or disability insurance for its members, or which sought to compel the Farm Bureau Federation to insure those who were neither members nor farmers, if it sought to provide a system of automobile insurance for its members alone.

Judge Charles Wyzanski, Jr. has remarked that "By the time that James Bryce came to write his *American Commonwealth* and Gunnar Myrdal, his *American Dilemma*, freedom of association was considered a deeply rooted characteristic of American Society" ("The Open Window and the Open Door," 35 Cal. Law Rev. 336 at 346). In its 1945 Statement of Essential Human Rights the American Law Institute included the "Freedom to Form Associations." Yet freedom of association must include the correlative right to be free of having the uninvited guest forced upon one and his associates.*

*Lest we seem to assert more than we mean, we add that the right of association does not create a right to associate in restraint of competition or to achieve monopoly nor can it condone exclusion of those who are necessarily affected by the exercise of powers which the law confers on the group for the benefit of all including those sought to be excluded, as in the case of collective bargaining representatives and the problem of the "closed shop and the closed union." The right of association may be limited where it inflicts injury on individual rights.

As said by Mr. Justice Frankfurter, concurring in *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538 at 546: "The right

We have stated the precise issue which the case presents to the Court. In a broader sense, the case presents this fundamental issue: In the revulsion from yesteryears' over-rigid construction of the due process clause, has the vast power of the state over the lives of its citizens become so utterly free of constitutional restraints that the state, under the guise of "regulation," can compel natural persons to devote their property to public functions and to convert their free associations into organs of the state?

Basically, what underlies the opinion of the court below is not any rule of law heretofore announced or any principle to be found in the decisions—we shall show that the decided cases and the principles are against appellee—but a theory of political philosophy. It is the theory that the state should be unhampered in dealing with the problems, real or fictitious, great or small, that may confront it.

That theory is incompatible with the political philosophy upon which this Republic has been founded. As Professor Hans Kelsen points out in his *"General Theory of Law and State,"* that philosophy is made part of our positive law by the Constitution: The Fathers of the American Constitution believed in certain in-born rights—the theory of natural law current in the 18th century—and expressed that view in the Constitution, and these rights are therefore constitutionally protected as fully as if stated in the text of the Constitution.*

of association, like any other right carried to its extreme, encounters limiting principles . . . At the point where the mutual advantage of association demands too much individual disadvantage, a compromise must be struck." The conflict of rights explains decisions in various fields, and we shall refer to it again. (See footnotes on pp. 36 and 41, *infra*.) Problems such as these involve considerations quite different from those pertinent to the present case. By organizing to insure members of the Association and by so limiting itself, appellant impinges on no one's rights and subtracts nothing from them.

*Kelsen, *General Theory of Law and State* (Harvard, 1949), pp. 266, 267:

"A catalogue of freedoms or rights of the citizens is a typical part of

The protection of these rights is encompassed by the expression "due process" as found in the Fifth and Fourteenth Amendments. That expression embodies the concept of restraint on the legislative power, enforced by judicial process, *Hurtado v. California*,

modern constitutions. The so-called 'Bill of Rights' contained in the first ten Amendments to the Constitution of the United States is an example. These amendments mostly have the character of prohibitions and commands addressed to the organs of the legislative, executive, and judicial powers. They give the individual a right in the technical sense of the word only if he has a possibility of going to law against the unconstitutional act of the organ, especially if he can put into motion a procedure leading to the annulment of the unconstitutional act. This possibility can be given him only by positive law, and consequently the rights themselves can only be such as are founded in positive law.

This, however, was not the view of the Fathers of the American Constitution. They believed in certain natural inborn rights, which exist independent of the positive legal order and which this order has only to protect—rights of individuals which the State has to respect under any circumstances, since these rights correspond to the nature of man and their protection to the nature of any true community. This theory—the theory of natural law—was current in the eighteenth century. It is clearly expressed in the Ninth Amendment: 'The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.' By this, the authors of the Constitution meant to say that there are certain rights which may neither be expressed in the constitution nor in the positive legal order founded thereupon. Nevertheless, the effect of this stipulation, from the point of view of positive law, is to authorize the State organs who have to execute the constitution, especially the courts, to stipulate other rights than those established by the text of the constitution. A right so stipulated is also granted by the constitution, not directly, but indirectly, since it is stipulated by a law-creating act of an organ authorized by the constitution. Such a right is thus no more 'natural' than any other right countenanced by the positive legal order. All natural law is turned into positive law as soon as it is recognized and applied by the organs of the State on the basis of constitutional authorization. Only as positive law is it relevant in juristic considerations."

During the pre-revolutionary period, there were numerous appeals to Magna Charta, which was regarded as an embodiment of some, but not all, of the fundamental rights of free men. See Mullett, "Fundamental Law and the American Revolution, 1760-1776" (Columbia University Press, 1933), where great numbers of examples are collected. In 1772, Samuel Adams declared that "an act of Parliament made against Magna Charta in violation of its essential parts is void" (quoted *id.* p. 99). In 1773, Charles Carroll quoted from Dr. Bonham's case for the same proposition (*id.* p. 106). And in 1776 the Declaration of Independence asserted as a self-evident fact that "all men . . . are endowed by their Creator with certain inalienable rights."

110 U.S. 516 at 535,* and that restraint is necessarily embodied in the idea of "a government of laws and not of men." *Yick Wo v. Hopkins*, 118 U.S. 356, 370.†

Concededly "due process" is not a rule like the rules of bills and notes, and we have been admonished that it did not install Herbert Spencer's Social Statics in the Constitution. But this Court has repeatedly shown that "due process" expresses rights not otherwise spelled out.

Only recently it said in *Wolf v. Colorado*, 338 U.S. 25 at 27:

"Due process of law . . . is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. . . .

" . . . The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion.' . . ."

*This Court there said:

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. . . . Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

†This Court there said:

"But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.'"

The very meaning of pricking out a line from case to case must be that once the line is pricked out, it serves as a standard and a guide. It is not drawn on water, obliterated in the very act of drawing and leaving the law at sea with neither North Star nor compass. Cf. *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355.

The court below states, in effect, that appellant's contention that the statute is unconstitutional would be right—if the case had arisen a few years ago. But, it argues, the pertinent principles have somehow been superseded by new and recent concepts of constitutional law. For this point of view it relies on no decision in point but on a supposed new spirit animating the law. It is true that within recent years this Court has upheld legislation which formerly would have been considered invalid. But the present law goes far beyond what the rationale of such cases upholds. It differs not merely in degree but in fundamental kind.*

Appellant recognizes the developments in constitutional law on the subject of due process. But it stands at the last barrier dividing legislative power controlled by constitutional restraints from legislative power answerable only to pressure groups and vagrant majorities.

If the basic political theory of the Republic that state power is not unhampered is to remain, there must be *some* limits on state power, and we submit that if there are any limits, they have been exceeded in this case.

We proceed to show that this statute is on the wrong side of a line that has been clearly pricked out, that it is unconstitutional under the decided cases, and that reason and the soundest policy require that it remain so.

*Cf. the statement made in another context by Mr. Justice Holmes: "The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. . . . at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear." *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 411.

II.

The Authorities Directly Bearing on the Power to Compel the Issuance of Insurance Show the Statute to Be Unconstitutional

National Union Fire Insurance Company v. Wanberg, 260 U.S. 71, involved the constitutionality of a North Dakota statute which prescribed that if an application for hail insurance is not rejected within 24 hours it will be deemed to have been accepted. Although sustaining the constitutionality of the statute, this Court held that it went to the verge of the Constitution. It said (p. 74):

"... Thus it is argued that by this statute mandatory obligation is substituted for freedom of contract, which is just that against which the Fourteenth Amendment was intended to secure persons. We agree that this legislation approaches closely the limit of legislative power, but not that it transcends it."

The reason? Because

"This does not force a contract on the company. It need not accept an application at all or it can make its arrangements to reject one within twenty-four hours." (p. 76)

The basis of the decision was that the statute merely required prompt action in view of the suddenness of hail storms. It merely modified the rules of contract law as to the manner in which an offer could be accepted, by making silence for a prescribed interval equivalent to acceptance.

Since the North Dakota statute went to the verge of the state's power, the present statute passes the line.

Following the *Wanberg* case, it was squarely held in *Employers Liability Assurance Corporation v. Frost*, 48 Ariz. 402, 62 P.2d 320, that a statute which attempted to impose upon insurers the obligation to issue policies to applicants violated the due process clause of the Fourteenth Amendment. The conclusion was reached after full consideration by a unanimous court in an exceptionally careful and well reasoned opinion. Speaking of the *Wanberg* case, the court said (62 P.2d at 325):

"It is easy to surmise that the court's decision, if the North Dakota statute had made it mandatory on the insurance company to assume the hail insurance risk upon application, would have been that the limits of regulation had been transcended and the freedom of contract guaranteed by the Federal Constitution violated."

There is no decision to the contrary in any controverted case where the issue was presented.*

III.

The Broad Ambit of the Power to Regulate Does Not Support the Statute. A Wide Gap Separates Regulation, However Broad, from Compulsion to Serve or to Contract. The Latter Has Been Confined to Public Utilities.

The court below waves aside the foregoing law, by arguing that with *Nebbia v. New York*, 291 U.S. 502, this Court drastically expanded the police power and its immunity from the due process clause.

Important as *Nebbia* was, neither it nor any subsequent case has gone so far as to support the application of the Assigned Risk Law to appellant. Unquestionably *Nebbia* is a landmark. But it is necessary to perceive just what it did and why it is notable.

What it held was that the degree to which business is subject to *regulation*, does not, as was formerly supposed, depend on whether it is "affected with a public interest." More specifically, the issue was the power to regulate prices. Prior to *Nebbia* it was supposed that price regulation was regulation so extreme that the power to fix rates and prices was confined to businesses "affected with a public interest" (p. 531). *Nebbia* destroyed that requirement. Giving to it the utmost effect and generalizing its rule beyond price regulation, it may be said that since *Nebbia* the rubric "affected with a public interest" has no significance whatever (p. 536).

*The court below cites a certain Massachusetts advisory opinion and certain Texas dicta. We discuss them at pp. 61-65, *infra*.

In eliminating that rubric *Nebbia* merely subjected all business to the same broad power of regulation as that to which insurance had long been subject, for as far back as *German Alliance Insurance Company v. Lewis*, 233 U.S. 389, insurance had been said to be "affected with a public interest."

A decision placing all business on a par with insurance does not expand the power over insurance beyond the constitutional limits already fixed by this Court.

Insurance is peculiarly susceptible to "regulation." The statement is so elementary as to be pedantic. But it is necessary to make it in order to eliminate it from the case as a misleading and false guide. To state it does not resolve this case. It merely places one at the threshold.

To "regulate" is one thing. To compel one to enter into a contract against his will, to insure risks he does not wish to insure, to associate with those with whom he does not wish to contract, is quite another. A wide abyss separates the two.

The power to regulate is the power to impose standards of right conduct, to prohibit injurious practices. Under it, as expounded by this Court in *Nebbia* and later cases, the state may prevent the use of property to the detriment of others, prescribe the terms that will enter into a contract if one chooses to make the contract, suppress business and industrial conditions offensive to public welfare, curtail the area in which one may contract, and fix rates and prices.

But none of this comprehends power to compel one to contract. A cooperative hurts no one by serving only its members.

Even regulation if "it goes too far will be recognized as a taking" and a violation of due process. Holmes, J. in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 at 416. Yet here the statute goes beyond regulation. To leap this gap is a course fraught, we submit, with dangers to the American system.

The *German Alliance* case, *supra*, has often been cited (e.g., 11 *Am. Jur.*, p. 1059, Note 7) as showing the difference between the power to regulate and the power to compel service.* It has always been deemed elementary that

"The fact that a business is affected with a public interest means that it may be regulated for the public good, but does not imply that it is under a duty to serve the public." (43 *Am. Jur.* 572, Public Utilities and Services, Sec. 2)

The fact that a business was "affected with a public interest" never sufficed to subject it to affirmative compulsion to serve or contract with anyone against its will, and the elevation of all business to the plane of those "affected with a public interest" has no such effect.

Thompson v. Consolidated Gas Co., 300 U.S. 55, in which this Court spoke through Mr. Justice Brandeis, was decided after *Nebbia*. The Texas Railroad Commission issued gas proration orders limiting the production of gas from the plaintiffs' wells, in order to compel "plaintiffs and others similarly situated to purchase gas from those well owners who have not provided themselves with a market and marketing facilities—well owners who under existing law are obliged to stop production, for want of a market, unless some marketing outlet is found" (p. 58). These others could not build pipe lines by reason of obvious financial difficulties (p. 61). Plaintiffs owned pipe lines but "none of the pipe lines here involved is a common carrier" (p. 60). The purpose of the orders was to reduce plaintiffs' production below

*The *German Alliance* decision was based on the fact that policyholders are at a disadvantage in bargaining with insurance companies and are in practice compelled to submit to charges "promulgated in schedules . . . which the applicant for insurance is powerless to oppose" (233 U.S. at 416). The opinion proceeds upon the theory that "the right to demand and receive service does not exist in the public" (p. 405), and sustains regulation of rates on the ground of inequality in bargaining power in a situation where the obligation to serve the public does not exist and where the insurance company is free to accept or reject risks.

capacity of their lines so as to create capacity for the others and "to compel complainants to afford markets to those having none" (p. 78).

The similarity of the case to the present is apparent, for here appellant is compelled to insure those who have no access to insurance otherwise. This Court held the Texas statute and the commission's orders to be violative of the due process clause of the Fourteenth Amendment and said (pp. 78, 79):

"There is no suggestion that any of them is a common carrier of gas. . . .

"Our law reports present no more glaring instance of the taking of one man's property and giving it to another."*

*The *Thompson* case is also instructive by way of contrast to another class of cases. Since oil and gas are fugacious substances found in subterranean pools underlying a surface divided among the ownership of many, so that whatever is extracted by one is drawn away from the others, it is a rule of property law in oil and gas states that the surface owners have common or correlative rights in the gas and oil. Any one of them may be accountable to the others for extracting more than his fair share. If one alone were to extract these hydrocarbons without payment to the others, he would in effect be confiscating their interests in the common property. To avoid this confiscation, the others are compelled to engage in a race of extraction. The race may result in squandering a natural resource.

The state may prevent such waste, and, also, it may adjust the correlative and co-equal rights of the parties in the hydrocarbon-pool. In doing so it may require those who are able to extract the gas and oil, because they have access to a market, to buy a quota from the others. This does not compel purchase by one of another's property but is a mode of accounting for property taken, for if not taken in this manner it would be taken by being drained off subterraneously. The basis of this kind of regulation is (1) conservation of a natural resource and (2) adjustment of correlative rights and the protection of co-equal rights in a common property. See *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 579; opinions of Douglas, J. and Rutledge, J. in *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 at 72 and 89; *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. . . . , 95 L.Ed. 156.

In the *Thompson* case, *supra*, because of a geological anomaly the plaintiff's wells could not drain oil away from the others. Cf. *Republic Natural Gas Co. v. Oklahoma*, *supra*, at 97. To compel the plaintiffs to purchase from others would consequently not have been an adjustment of correlative rights in a common property, and the law was held unconstitutional as applied to plaintiffs.

As the *Thompson* case reminds us, there is, of course, a class of business in which a duty of compulsory service may be said to exist or may be imposed. We refer to public utilities. But it has always been held that to compel one not a public utility to enter into contracts against its will is a violation of due process. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 592; *Michigan Commission v. Duke*, 266 U.S. 570; *Smith v. Caboon*, 283 U.S. 553, 563; *Terminal Taxicab Co. v. District of Columbia*, 241 U.S. 252, 256; *Thompson v. Consolidated Gas Co.*, supra; *Producers Transportation Co. v. Railroad Commission*, 251 U.S. 228.*

Wyman, Public Service Corporations, comparing the power of the state over the public utility with its power over other business, epitomizes the matter thus (vol. 1, p. 32): "... the difference ... is more than one of degrees; it is one of kind The law says to those in public business, you must do this for this applicant, and you must do it thus and so. To those in private business it says you must not do this, or if you do this you must do it thus and so."

In *Stephenson v. Binford*, 287 U.S. 251, the Court emphasized the distinction between the power to regulate and the power to compel service, and it recognized the line between public utility and non-public utility as the dividing line between the proper exercise of the two powers.

Oddly, the court below argues that in the *Stephenson* case this Court has changed the law (R. 184).† Yet subsequent to the

*Many other cases could be cited; e.g., *Allen v. Railroad Commission*, 179 Cal. 68, 88, 175 P. 466; that "it constitutes a taking of the same admits of no controversy," *Associated Pipe Line Co. v. Railroad Commission*, 176 Cal. 518, 528, 169 P. 62, approved in *Producers Transportation Co. v. Railroad Commission*, supra, at 230, 231; *Hollywood Chamber of Commerce v. Railroad Commission*, 192 Cal. 307, 310, 219 P. 983.

†Thus it says:

"The difficulty with appellant's argument, and with the Arizona case, is that they disregard or treat cavalierly, most of the relatively recent constitutional law cases dealing with the subject of the police power, and

Stephenson and *Nebbia* cases this Court in *Thompson v. Consolidated Gas Co.*, supra, cited with approval both the *Frost* and *Duke* cases.

What *Stephenson* holds is that one does not have to be a public utility in order to be subject to "regulation." Theretofore it had sometimes been supposed that a private carrier could not be regulated or subjected to any control by public service commissions. This view in part was the result of construction of statutes which made the fact of being a public utility the test of the commission's jurisdiction.

Stephenson held that private carriers are subject to regulation, but it expressly recognized that they are not subject to compulsory service. The issue was whether the state could regulate use of the highways by private motor carriers, require private carriers to obtain a permit from the public utility commission, and empower the commission to prescribe their rates. This Court said that there was no "attempt to convert private contract carriers by motor into common carriers." (p. 265)

"Appellants, in support of their contention, rely upon prior decisions of this court; but there is nothing in any of them, as a brief review will disclose, which requires us to hold that the legislation here under review compels private contract carriers to assume the duties and obligations of common carriers, or interferes with their freedom to limit their business to that of carrying under private contracts as they have been wont to do." (p. 266)*

rely upon the earlier cases containing a very restricted viewpoint of the State's police power. Thus, many of the principles discussed in *Frost v. Railroad Commission*, 271 U.S. 583, and *Michigan Commission v. Duke*, 266 U.S. 570, relied upon by appellant, which cases held that a contract carrier could not be subjected to the burdens imposed on a public utility, were drastically modified as early as 1932 in *Stephenson v. Binford*, 287 U.S. 251.

*In *Morel v. Railroad Commission*, 11 Cal.2d 488, 497, 81 P.2d 144, the *Stephenson* case was referred to as recognizing the power to regulate private carriers so long as the state does not try to convert them into public carriers and lets them "choose their own patrons, and refuse to accept business as suits their convenience."

In *Champlin Refining Co. v. United States*, 329 U.S. 29, the Court construed a federal statute as granting power to the Interstate Commerce Commission to compel the owner and operator of a private pipe line to furnish information. In sustaining the statute it said (pp. 34, 35):

"Appellant further contends that, as so construed, the Act exceeds the commerce power of Congress and violates the due process clause of the Fifth Amendment because, it is argued, this interpretation converts a private pipe line into a public utility and requires a private carrier to become a common carrier. But our conclusion rests on no such basis and affords no such implication. The power of Congress to regulate interstate commerce is not dependent on the technical common carrier status but is quite as extensive over a private carrier. This power has yet been invoked only to the extent of requiring Champlin to furnish certain information as to facilities being used in interstate marketing of its products. . . .

"The contention that the statute as so construed violates the due process clause by imposing upon a private carrier the obligations of a conventional common carrier for hire is too premature and hypothetical to warrant consideration on this record. *The appellant in its entire period of operation has never been asked to carry the products of another and may never be. So far, the Commission has made no order which changes the appellant's obligations to any other company or person.* If it does, it will be timely to consider concrete requirements, and their specific effects on appellant." (pp. 34, 35)

Roig v. People of Puerto Rico, 147 F.2d 87 (1 Cir.) also recognizes the difference between regulation and compulsion to serve.

It sustained a Puerto Rico act requiring sugar mills to obtain a franchise from the Public Service Commission, because

"As construed by the court below, the Sugar Act does not convert all sugar mills into public service enterprises and force them to serve the public. It merely requires all sugar

mills to submit to the Public Service Commission by taking out franchises. . . . The power of the Public Service Commission to force a mill to serve the public against its will, therefore, is not before us on this appeal." (pp. 89, 90) [Italics are the court's]

In *Fordham Bus Corporation v. United States*, 41 F. Supp. 712, a three-judge court, following and citing the *Stephenson* and *Nebbia* cases, held that one did not need to be a public utility to be subject to regulation, but said:

"A different problem would arise if the statute necessarily required—or if the Commission were requesting—that plaintiff establish joint through routes or *undertake to serve all comers in respect of its charter operations*. Its solution would depend, however, not on any magic in plaintiff's denomination of itself as a 'contract carrier,' but on the more prosaic issue of *whether petitioner could constitutionally be required to alter so radically its type of operations*. As to that, we pass no judgment, since the question has not been presented."

The opinion below quotes a passage from *Lincoln Federal Labor Union v. Northwestern I. & M. Co.*, 335 U.S. 525, 536, that beginning with the *Nebbia* case the Court had "rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases." That philosophy limited the power to regulate and enters not at all into our criticism of the statute here involved. Mr. Justice Holmes' dissent in the *Adair* case is now the accepted view. But let what he said be noted:

"The section is, in substance, a very limited interference with the freedom to contract, no more. *It does not require the carriers to employ anyone*. It does not forbid them to refuse to employ anyone, for any reason they deem good . . ." (*Adair v. United States*, 208 U.S. 161, 191).

Mr. Justice Holmes' emphasis on the distinction between regulation and compulsion to deal was not accidental. He repeated it

in almost identical form in his dissent in the minimum wage case, *Adkins v. Children's Hospital*, 261 U.S. 525:

"This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living" (p. 570).

These two statements would have been pointless except as emphasizing that the regulation was permissible because on the other side of the line from compulsion to serve. In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 396, where the *Adkins* case was overruled and the dissent finally prevailed, this Court describes the statement just quoted as "pertinent."*

The fundamental error of the court below—its failure to distinguish between "regulation" and compulsion to contract—is brought into sharp focus by its description of *Hoopston Canning*

*Mr. Justice Holmes' dissent in *Adair* found adoption in *Phelps-Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, and *National Labor Relations Board v. Jones & Laughlin*, 301 U.S. 1, which sustained orders prohibiting employment discrimination based on union affiliation. In *Jones & Laughlin* this Court said (p. 45):

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."

In *Phelps-Dodge Corp.* this Court said (p. 186):

"He is as free to hire as he is to discharge employees. The statute does not touch 'the normal exercise of the right of the employer to select its employees or to discharge them.' It is directed solely against the abuse of that right by interfering with the countervailing right of self-organization."

These cases are but another example of striking a balance between two rights when they conflict with each other, to which we referred in the footnote on page 28, *supra*. There is no such conflict in the present case.

Some reference was made in the arguments below to racial discrimination, although that subject is not involved in this case. The constitutionality of statutes prohibiting discrimination because of race, color or religion rests on a different basis and turns on a different set of considerations from any involved here. See, for example, the discussion in *Railway Mail Association v. Corsi*, 326 U.S. 88 at 98, and *James v. Marins-ship Corporation*, 25 Cal.2d 721 at 739, 740, 155 P.2d 329 at 339.

Co. v. Cullen, 318 U.S. 313, as "peculiarly applicable" (R. 189). The only resemblance between that case and this is the superficial one that *Hoopeston* involved a reciprocal insurance association. The Court held that reciprocals may be regulated. It did not so much as intimate that they may be compelled to insure others.*

We have mentioned every decision of this Court on which the court below relies except *Osborn v. Ozlin*, 310 U.S. 53. The Court there upheld a statute which prohibited insurance companies from making contracts of insurance on persons and property within the state except through residents agents. The statute was regulation. It did not compel the issuance of insurance. In its opinion this Court lists many things that states may do (pp. 65, 66). In *Nebbia v. New York*, 291 U.S. 502, at 526-529, appears an even more elaborate catalog. Doubtless these do not exhaust the field, but the striking fact is that every item on these lists is an example of regulation as we describe the term at p. 34, *supra*.

IV.

Even if the Rules Pertaining to Public Utilities Were Now to Be Extended to Insurance, the Statute Could Not Constitutionally Compel Appellant to Insure Non-Members, That Being Beyond the Scope of Its Dedication.

The business of insurance, of course, is not a public utility.

The court below would extend the rules applicable to public utilities to the insurance business. As we have seen, *Nebbia v. New York*, *supra*, was noteworthy because it eliminated the rubric "affected with a public interest" as the criterion of the power to

*In the *Hoopeston* case, in the interests of solvency of the insurer and the protection of its subscribers the state prohibited a reciprocal from entering into agreements with subscribers of limited assets. Here the statute seeks to compel subscribers of a reciprocal to enter into contracts with others, whose responsibility is so bad that no one will insure them voluntarily! Two more different cases it would be difficult to imagine.

"regulate." It would be a still further step to eliminate the rubric "public utility" as a test of the power to compel contracts against one's will.

Neither in its holding nor in its reasoning did *Nebbia* take that step. But if it did, or if reason justifies the taking of that step now, still it would not answer the issue which appellant presents.

Taking that step could only justify going behind the name and label but not behind the basic reasons and substance of the principles expressed by the label. It would support going behind the name "utility," but would only mean that the principles now applied to utilities would be applied to ~~all businesses or the insurance business.~~

It is essential to see just what those principles are. It will then be apparent that, even if commercial insurers for profit can be compelled to insure the public generally, and even if appellant can be compelled to insure any member of the Automobile Association that applies,* it cannot be compelled to insure non-members.

The substance of the public utility principle—its foundation—is that when one has in fact *voluntarily* offered to deal with the public generally, he may not discriminate *within the scope of his voluntary dedication or offer*. The law does not extend the scope of the party's offer. The rule is not truly one of compelling service. Rather, in its very essence, the rule is one against discrimination; it forbids discrimination within the range of one's voluntary holding out.

The test of a public utility is a fact—the fact of whom it has held itself out as ready to serve. It is the voluntary action of serving or offering to serve the public "generally" or "indifferently" which fixes the public status. It must be shown that one "undertakes generally and for all persons indifferently" to perform the service in which he is engaged.

*As stated at p. 7, *supra*, while appellant has never insured non-members, it often has rejected members.

These principles are too elementary to require elaboration. The cases are legion. E.g., *Motor Haulage Co. v. Maltbie*, 293 N.Y. 338, 57 N.E.2d 41, 51; *Thayer v. California Development Board*, 164 Cal. 117, 127, 128 Pac. 21; *Forsyth v. San Joaquin Light, etc., Co.*, 208 Cal. 397, 404, 281 Pac. 620; *State v. Public Service Commission*, 275 Mo. 483, 205 S.W. 36, 42. "This has long since been pointed out as ancient," Robinson, *The Public Utility Concept*, 41 Harv. Law. Rev., 276, at 203.*

Wyman on Public Service Corporations states:

"It should be remembered, in justification of the imposition of the extraordinary law which requires those who are engaged in public callings to serve all that apply, that the service is voluntarily assumed." (Vol. 1, p. 167)

And again:

"The fundamental characteristic of a public calling is indiscriminate dealing with the general public." (Vol. 1, pp. 197, 198)

It is equally elementary that if one has not in fact offered to do business with the public generally or indifferently, no law and no state constitution can constitutionally make him into a public utility. One becomes a public utility by fact not fiat. In *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, this Court said (p. 592):

"That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legisla-

*Advocating an extension of the public utility concept, Adler, "Business Jurisprudence," 28 Harv. L. Rev. 135, 136, 137, argued that anciently the status of the common carrier was not peculiar and that the calling of any man was a "common" one if "he solicit[ed] the favor of and undert[ook] to deal with persons *indifferently* for profit." (Italics are the author's.) The author purported to find stray vestiges of this supposed ancient conception as late as 1714. Assuming the ancient existence of this conception, it had disappeared as part of the change in the basic outlook marking the medieval from the modern. But assuming that it could now be revived (see pp. 28, 29, *supra*), the necessity of "undertaking to deal with persons *indifferently* for profit" would still remain.

tive command, is a rule not open to doubt and is not brought into question here."

Here, too, the cases are legion, extending to the present time. *Michigan Commission v. Duke*, 266 U.S. 570; *Smith v. Caboon*, 283 U.S. 553 at 563; *Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207 at 210; *Producers Transportation Co. v. Railroad Commission*, 251 U.S. 228, 230, 231; *Texoma Natural Gas Co. v. Railroad Commission of Texas*, 59 F.2d 750 (3 judge court), approved in *Thompson v. Consolidated Gas Co.*, 300 U.S. 55, at 79; *Motor Haulage Co. v. Maltbie*, *supra*; *Morel v. Railroad Commission*, 11 Cal.2d 488, 497, 81 P.2d 144.

Under the guise of regulation a state cannot require one to engage in a service that he was theretofore under no duty to perform. *Delaware, L. & W. R. R. Co. v. Morristown*, 276 U.S. 182, 195.

The same principles that forbid conversion of a private carrier into a common carrier or a private utility into a public utility also make it constitutionally improper to compel a public utility to serve beyond the limits to which its voluntary dedication or holding out has extended. What is the scope of a public utility's voluntary dedication has sometimes been debated, but it has never been doubted that its voluntary dedication marks the limits of its compulsory service.

Wyman, *Public Service Corporations*, states (Vol. 1, p. 219):

"Public profession not only establishes public obligation, but it largely determines the extent of the public duty. Just as people cannot be forced to serve unless they have made public profession, so they cannot be forced to serve beyond what their profession covers. The primary question is, therefore, what their profession fairly covers; and this is again a question of fact rather than of law."*

*"To require a public utility to devote its property to a service which it has never professed to render or to the service of a territory which it has never undertaken to serve is tantamount to taking that property for public use without just compensation." 43 Am. Jur., Sec. 22, p. 588.

As said in *Northern Pacific Railroad Company v. North Dakota*, 236 U.S. 585, 595 (Hughes, J.), speaking of a common carrier:

"... it must serve without unjust discrimination. . . .

* * * * *

"But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage."

The "authorities are unanimous in declaring that in dealing with public utilities, regulation of use within the dedicated use is as far as the police power may be extended. . . ." *Pacific Telephone & Telegraph Company v. Eshleman*, 166 Cal. 640 at 680; 137 Pac. 1119.*

**SERVICE TO MEMBERS OF THE ASSOCIATION IS THE
UTMOST LIMIT OF APPELLANT'S DEDICATION.**

Suppose, then, that the concept of "public utility" were to be discarded as the criterion of compulsory service, and that the same power of compulsion were applied to insurance. The fundamental

*The court further said in that case (p. 699) and partially repeated in *Hollywood C. of C. v. Railroad Commission*, 192 Cal. 307, 311, 219 Pac. 983:

"... it cannot be doubted that an order compelling the owner of private property, against his will, to subject that property to the use of the public or of an individual, amounts to a taking of property.

... Where the particular property has been dedicated to a public use; where the property, in other words, is employed in a public service, the owner has consented that the public may use his property within the limits to which the dedication extends. . . . But the fact

rule that one cannot be compelled to serve beyond the limits of his voluntary dedication would still remain.

In that event, it might conceivably be said of insurers engaged in business for profit, that they have already offered to do business with the public generally, that they are "common insurers," and therefore that the law can require them to serve within the full ambit of that offer.

That argument, however sound,* could have no relation to appellant. The scope of *its* activities, the extent of *its* offer, the ambit of *its* dedication since its inception have been to serve only members of the State Automobile Association. *That basic fact is a finding of fact on which the case comes to this Court.* For convenience we requote the finding:

"That petitioner was formed and organized in the year 1914, solely for the purpose of making insurance available to, and has in practice limited its insurance coverage to 'Members of the California State Automobile Association or corporations or firms in which such members are officers or partners,' and has at all times thereafter existed solely for that purpose, and it has continued this practice in force . . . From its inception it has at all times been and it is petitioner's basic policy that only members in good standing of the California State Automobile Association or corporations

that property has been offered for one public use does not authorize the public to use it for other and different purposes. The purveyor of a public service—whether that of a carrier or an innkeeper, a light or power company, a telephone or a telegraph company, is not bound to undertake a service different from that which he has professed to render (Wyman on Public Service Corporations, sec. 251)."

*Rationally, no insurer has ever held himself out as ready to insure the public indifferently or generally. In the case of carriers and other utilities, one man's goods to be carried are much like another's, and the same thing is true of all of the public callings. But insurance is a very different matter. One man's insurance risk is not like another's. To extend the category of the public callings to a business like insurance involves a burden upon insurers which differs both in kind and degree from a similar extension in other lines of business. The insurer faces the same kind of problem as the banker when an applicant seeks a loan. Each risk is unique; and the factors are highly subjective.

or firms in which such members are officers or partners shall be eligible to apply for insurance in petitioner." (R. 43, 44)

The appellant does not propose and has never proposed to issue insurance to the general public. The very charter which gave it existence restricted its insurance service to a certain group.

This fact distinguishes appellant not only from corporate insurers for profit but also from reciprocals that have been open to all.

To compel appellant to insure non-members is, in the language of *Fordham Bus Corporation v. United States*, 41 F. Supp. 712 (3 judge court), to compel it to alter radically its type of operations. And, as said in that case, that is a different problem from subjecting it to regulation. We submit that the state cannot constitutionally impose on appellant any such burden, whatever it may do to commercial insurers for profit dealing with the public generally.

These principles have been basic: No one can be made a public utility by legislative fiat; the test of whether one is a public utility is the fact of his voluntary holding out, his voluntary dedication; and one may not be compelled to serve beyond his voluntary dedication.

Upon these principles the law of public utilities and the entire structure of control has been erected. If the decision of the court below is affirmed, the foundation and structure is swept away as so much useless rubble, for the power of control will have a new basis of justification, without limit or confine.

**THE SCOPE OF ONE'S DEDICATION IS MEASURED
BY WHAT IT HAS DONE IN FACT.**

The court below would avoid the principle that one may not constitutionally be compelled to serve beyond its dedication by substituting a legal fiction for the facts. It asserts (R. 193):

"... If appellant has 'dedicated' its business to the public service, it has dedicated it to the writing of automobile liability insurance. The extent of its 'dedication' cannot be

measured by its past customs or practices, but must be measured by the extent of its powers under the law. While appellant has heretofore only insured a select group, that does not mean that appellant has 'dedicated' its business to that group. Under the law (Ins. Code, § 108) this company has the legal right to write automobile liability insurance on a statewide basis and for all applicants. That is the real extent of its 'dedication'."

This escape from the facts is an attempt to dissolve fundamental principles by mere verbal expression. It is fallacious both in law and in fact.

It is fallacious in law because the extent of one's dedication is not a question of law, but of fact. For example, a corporation's charter may empower it to carry for the public generally; yet if in fact it has never offered to do so and has not done so, it cannot be compelled to do so. The extent of its dedication is measured by what it has done, not by what it would have had power under the law to do had it so chosen.

As Mr. Justice Holmes has said (*Terminal Taxicab Co. v. District of Columbia*, 241 U.S. 252, 254), "the important thing is what it does, not what its charter says."

In 14 *Fletcher's Cyc. Corporations* (Perm. Ed., 1945 Rev. volume) p. 82, Section 6692, it is said:

"However, the actual business conducted by the corporation, rather than the authority conferred by its charter, controls the determination whether a corporation is a public utility. The fact that its articles of incorporation empower a corporation to engage in public service does not, of itself, show that it is engaged in public service, and the real test would appear to be not what a corporate charter may say but rather and only what the corporation is in fact doing."

To the same effect see *De Pauw University v. Public Service Commission of Oregon*, 253 Fed. 848; *Del Mar Water L. & P. Co. v. Eshleman*, 167 Cal. 666, 673, 140 Pac. 591; *Southern California Edison Co. v. Railroad Commission*, 194 Cal. 757,

at 763, 230 Pac. 661; *Interstate Commerce Commission v. Oregon Washington R. Co.* 288 U.S. 14, 43; *State v. Public Service Commission*, 275 Mo. 483, 205 S.W. 36, 39.*

Patently, this must be so. If a corporation's "charter" conferred on it every power, its powers would be no greater than those of a natural person. Yet no one would say that natural persons have dedicated themselves to the public generally.

Appellant is not a corporation but a collection of natural persons and, *a fortiori*, even if its "charter" permitted it to insure the public generally, it has not thereby dedicated itself to do so, for it has never done so in fact.

But in fact appellant has no "charter" authorizing it to insure the public. In stating that appellant has a legal right to write liability insurance for all applicants, the court below says no more than that California law permits reciprocals to be formed to insure anyone. But the extent of a particular reciprocal's powers is not measured by the extent to which the state law would permit a reciprocal to go, if it wished to go that far. The measure is the power of attorney which each participant gives to a common attorney in fact to represent him in the exchange of their insurance contracts. If a reciprocal can be said to have a "charter," it is this power of attorney.

In Appendix II to this brief we set out the statutory provisions about reciprocals (Insurance Code, Sections 1300, et seq.). They provide that any persons, called subscribers, may exchange contracts with each other insuring against any loss; that the organiza-

*As said in the *De Pauw* case (pp. 849-50) supra:

"... the plaintiff ... merely undertook to furnish water in fulfillment of a private contract with certain individuals selected by them, and not to the public generally, and therefore were not public utilities."

"The fact that under their articles of incorporation the several companies might have engaged in the business of a public utility does not ipso facto make them so. The chartered authority did not mark the nature of the operating companies. It is merely a naked authority to do business, but until it is pursued in a certain way it did not make the companies public utilities."

tion under which the subscribers exchange contracts is termed a reciprocal or interinsurance exchange; that the contracts may be executed by an attorney in fact acting under powers of attorney, the form of which must be filed with the Insurance Commissioner; that "the power of attorney and contracts made thereunder may: . . . (b) *Impose such restrictions upon the exercise of the power as are agreed upon by the subscribers*" (Sec. 1307); and that the reciprocal must be operated in "conformity with the subscribers' agreement and power of attorney" (Sec. 1308).

As we have seen (pp. 7, 8, *supra*), since its inception in 1914 appellant's power of attorney has provided that "Only members in good standing of the California State Automobile Association, or corporations or firms in which such members are officers or partners may be eligible to apply for insurance in the Bureau."

By signing that power each subscriber agrees to be bound for the losses of others, provided they are members of the Automobile Association and not otherwise. To subject appellant to the statute compels it to rewrite the terms of its existence and to change its basic charter.

The suggestion of the court below that because appellant has written automobile liability insurance it has dedicated itself to the writing of automobile liability insurance generally is a non-sequitur. Under this reasoning there never could be a private carrier, for by carrying for any group, however limited, a carrier would be dedicating himself to carry for all generally.*

*Insurance Code, Sec. 108, cited in the passage quoted from the court's opinion above merely defines "liability insurance." It reads:

"Liability insurance includes:

"(a) Insurance against loss resulting from liability for injury, fatal or nonfatal, suffered by any natural person, or resulting from liability for damage to property, or property interests of others but does not include workmen's compensation, common carrier liability, boiler and machinery, or team and vehicle insurance;

"(b) With respect to operations or property covered by a policy of liability insurance as defined in subdivision (a), insurance of

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A COOPERATIVE MAY NOT BE COMPELLED TO SERVE NON-MEMBERS.

Since appellant is a cooperative group banding together in reciprocal self interest, it is pertinent to note that the rule that one cannot constitutionally be converted by legislative command into a public utility has been applied with particular solicitude to cooperatives.

In *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, the carrier who was held not to be a public utility was engaged in carrying for members of a cooperative. In its opinion in that case this Court cited approvingly *Hissem v. Guran*, 112 Ohio St. 59, 146 N.E. 808, and *State v. Nelson*, 65 Utah 457, 238 Pac. 237.

Hissem v. Guran held that a carrier engaged in the business of carrying for the members of a cooperative was not a public utility and could not be converted into one. It had not dedicated itself to serving the public *indifferently* but was confining itself to the members of the cooperative.

Relying on *Hissem v. Guran* is *Dairymen's Cooperative Sales Assn. v. Public Service Commission*, 318 Pa. 381, 177 A. 770. There a trucker entered into contracts with the cooperative and its 17,000 members to haul their milk products. The Commission contended that hauling for such a large number of persons made the trucker a common carrier. Applying the usual test of a common carrier—"undertaking to carry the goods of all persons indifferently"—the court held otherwise.

It emphasized as the essential quality of a cooperative the relationship between him who supplies the service and him who receives it as not that of buying and selling between strangers

medical, hospital, surgical and funeral loss or expense of the insured or other persons injured, irrespective of legal liability of the insured, when issued with or supplemental to the insurance defined in subdivision (a);

(c) The provisions of this code relating to disability insurance do not apply to insurance defined in subdivision (a)."

but rather of mutual cooperation to a common end. These remarks fit appellant.*

The other case cited by this Court, *State v. Nelson*, was relied on in *Garkane Power Company v. Public Service Commission* (1940), 100 Pac. 2d 571, 98 Utah 466, a well-reasoned opinion containing a review of the authorities. The court held that Garkane Power Co. was not a public utility:

"The record shows that Garkane was incorporated for the purpose of generating or acquiring electric energy to distribute and sell to its *members only*. The Corporation is non-profit, and any excess money collected is to be returned or credited to the member consumers pro rata on the basis of the amount of electrical energy consumed during the period in which the excess was collected. . . ." [Italics are the court's] (p. 572)

Speaking of the distinction approved by this Court that one is not a public utility "where the business or operation is not open to an indefinite public," the court said (p. 572):

"The distinction there made is valid, and is conclusive of this case. Garkane does not propose to hold itself out to serve all who apply and live near its lines; its very charter which gives it existence restricts its service to a certain group (members). *It does not propose to serve 'the public generally,' but only to serve its members.*"

So here: Appellant does not propose and never has proposed to issue insurance to the general public. The very charter which gave it existence restricts its insurance service to a certain group, namely, members of the California Automobile Association.

The court further pointed out:

*In *Mitchell v. Pacific Greyhound Lines*, 33 C.A.2d 53, 91 P.2d 176, the California court, speaking of insurance reciprocals, said (p. 60): "The plan appears to be designed for those who desire to assume the positions of both the insurer and insured with a view to eliminating that part of the ordinary insurance premium which goes into profit."

"The distinction between a public service corporation and a cooperative is a qualitative one. In a cooperative the principle of mutuality of ownership among all users is substituted for the conflicting interests that dominate the owner vendor-non owner vendee relationship. In a cooperative all sell to each." (p. 573)

Both the *Dairymen's* case and the *Garkane* case were decided after *Nebbia v. New York*, 291 U.S. 502.

The consensus of the cases is summarized in an annotation in 132 A.L.R. 1495, 1498:

"If it confines its service to its own stockholders or to members of its own group and does not hold itself out as willing to serve the public, it is not ordinarily considered as a public utility."

And see annotation, 98 A.L.R. 226.

**THE WIDE SCOPE OF CONTROL OVER CORPORATIONS
IS NO MEASURE OF A STATE'S POWER OVER OTHERS.**

The power of the state to impose compulsory service on corporate insurers may involve different considerations than the power to impose compulsion on appellant.

The wide scope of control over corporations is no measure of a state's power over others. It has even been doubted whether corporations can claim the protection of the due process clause of the Fourteenth Amendment (see Douglas, J., in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 at 576). While that position has not received the approval of the Court, it is settled that corporations can claim no equality with individuals in the enjoyment of rights. *United States v. Morton Salt Co.*, 338 U.S. 632 at 652. As stated in *Waters-Pierce Oil Company v. Texas*, 177 U.S. 28 at 43, the powers and rights of corporations

"cannot find an answer in the rights of natural persons . . . A corporation is the creature of the law . . . the State prescribes the purposes of a corporation and the means of exe-

cutting those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations."

See also *New York Life Ins. Company v. Gravens*, 178 U.S. 389; *Packard v. Banton*, 264 U.S. 140; *Washington v. Superior Court*, 289 U.S. 361, 365.*

V.

The Statute Cannot Be Sustained on the Theory That It Does Not Compel Appellant to Insure Non-Members but Merely Terminates Its Right to Do Business if It Declines. The Doctrine of Unconstitutional Conditions Precludes That Theory.

The court below finally admits that appellant cannot be compelled to assume unwanted risks, but it indulges in a fiction to deny that the statute has that effect. It states (R. 193):

"No company can be compelled to assume a risk. But if it refuses to accept an assigned risk, its right to do business in this state may be terminated."

*This is the highwayman's order, "Your money or your life." In *Union Pacific Railroad Company v. Commission*, 248 U.S. 67 at 70, the Court, through Mr. Justice Holmes, said:

"... as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary. . . ."

It refused to countenance an order predicated upon such illusory power of choice.

A lawful power of a state—even the power to grant or deny a privilege—cannot be exercised as an instrument to accomplish an unconstitutional result. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593.

*Cf. Mr. Justice Brandeis in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 at 406: "The difference between a business carried on in corporate form and the same business carried on by natural persons is, of course, a real and important one."

In the case just cited, the California Supreme Court, while conceding that the State could not convert a private utility into a public utility, held that the State had the power to grant or withhold from its citizens the privilege of using the highways, and having such power, could grant the privilege for private gain on "condition that [the citizen] dedicate the property used by [him] in such business to the public use of public transportation" (p. 237).

This Court reversed. Conceding that the right to use the highways was merely a privilege which the State could grant or deny, it held that the State could not use its power to accomplish an unlawful purpose; it could not use it to require a private carrier to become a public carrier. It said (p. 593):

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. *It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.*"

This principle was applied and the *Frost* case cited in *Phillips Petroleum, Co. v. Jenkins*, 297 U.S. 629, 634, a unanimous decision.

Earlier, in several opinions written by Mr. Justice Holmes, the same principle had been applied. Thus in *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426, 434, an insurance corporation was held entitled to an injunction restraining a state corporation commissioner from suspending its right to do business. The Court said:

"... we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. . . . Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court . . . or to tax it upon property that by established principles the State has no power to tax . . . or to interfere with interstate commerce. . . ."

In *Western Union Telegraph Co. v. Foster*, 247 U.S. 105, reversing the Supreme Judicial Court of Massachusetts, the Court (by Mr. Justice Holmes) said (p. 114):

"... It is suggested that the State gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end . . . and a constitutional power cannot be used by way of condition to attain an unconstitutional result . . . It cannot be justified under that somewhat ambiguous term of police powers."

What may not be done directly may not be done indirectly. In *Texoma Natural Gas Co. v. Railroad Commission of Texas*, 59 F.2d 750, a three judge court had declared unconstitutional the Texas "Common Purchaser Act," which commanded pipe-line carriers of gas to buy gas from others having no access to the market. A later act sought the same result by limiting the amount of his own gas that a producer could ship through his own pipe

lines. As noted at pp. 35, 36, *supra*, this Court held the statute unconstitutional (*Thompson v. Consolidated Gas Co.*, 300 U.S. 55), pointing out that the effect of the two statutes on the pipe line owners was the same (p. 79):

"There is a difference in the means employed; but the difference is not of legal significance. The 1931 Act attempted to compel the purchase by frankly commanding it, under sanctions criminal and civil. The 1935 Act operates by indirection. Its command is no less compelling; its penalties not significantly different."

"If the avowed purpose or self-evident operation of a statute is to . . . make up for its inability to reach [a result] directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good." *Miller v. Milwaukee*, 272 U.S. 713, 715 (per Holmes, J.). The inquiry must be whether federal constitutional rights have been denied in substance and effect. *Oyama v. California*, 332 U.S. 633 at 636.

In recent years the principle of unconstitutional conditions has been applied for the protection of civil rights. *Hague v. C.I.O.*, 307 U.S. 496 at 515; *Thomas v. Collins*, 323 U.S. 516 at 54; *Danskin v. San Diego Unified School District*, 28 Cal.2d 536, 171 Pac.2d 885.*

*In the *Danskin* case a School Board granted the use of a public school building on condition that the applicant take an oath that he did not advocate and was not affiliated with any organization advocating the overthrow of the government by force or violence. The Court said (p. 545):

"... A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property. (*Frost v. Railroad Commission of California*, 271 U.S. 583, 594 [46 S.Ct. 605, 70 L.Ed. 1101]; *Hague v. CIO*, 307 U.S. 496, 515 [59 S.Ct. 954, 83 L.Ed. 1423]; *Murdock v. Pennsylvania*, 319 U.S. 105, 110-111 [63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81]; see the brief of the Bill of Rights Committee of the American Bar Association filed in *Hague v. CIO*, *supra*, reprinted in 25 American Bar Association Journal, 7, 8, 74.)

"Since the state cannot compel 'subversive elements' directly to

In *Hannegan v. Esquire*, 327 U.S. 146, the Court said:

"But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever."

**APPELLANT'S RIGHT TO DO BUSINESS IS NOT
A PRIVILEGE DERIVED FROM THE STATE.**

The foregoing cases limit a state's power to deny a privilege. *A fortiori*, they apply here. Not being a corporation, appellant does not draw its existence from the state. Its right to do business is not a privilege derived from the state. As a reciprocal it is simply an aggregate of private contracts among persons desiring to provide themselves with cooperative insurance by agreeing, among themselves, to share losses which any member of the group may suffer. The right so to contract with each other was not the creature of statute, and reciprocals existed before adoption of any of the statutes dealing with them.

As said *In re Minnesota Insurance Underwriters*, 36 F.2d 371:

"Certain groups of individuals had found this plan an economical and practical method of providing indemnity. One man might not be sufficiently strong financially to bear the risk of loss alone, but he and a number of his friends and acquaintances—or others engaged in the same line of business could form a group or association abundantly able to act as their own insurers, and thus procure insurance at or near its actual cost. This scheme of insurance was peculiarly attractive to those owning what are generally known in the insurance world as 'perferred risks,' where the danger of loss is small." (P. 372)

renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building. Such a condition is as unconstitutional as the condition that a foreign corporation pay a tax for the privilege of doing business that could not otherwise be constitutionally imposed on it . . . or agree to abstain from resort to the federal courts . . . or the condition that a public carrier obtain a certificate of public convenience and necessity before using the public roads. (*Frost v. Railroad Commission of California*, supra, 271 U.S. 583.)"

See also discussion by the Honorable Justin Miller, formerly of the Court of Appeals of the District of Columbia in 9 F.R.D. 217 at 233.

A reciprocal's right to do business is thus unlike the privilege to use publicly built highways in the *Frost* case. The business is in no way "dependent upon public grants or franchises for the privilege of conducting [its] activities." *Nebbia v. New York*, 291 U.S. 502 at 531.

Of course, the right to engage in insurance as a reciprocal may be regulated. It may be limited. If the state should conclude that it is an unwise method of insurance and against public policy, possibly it might even forbid individuals from contracting with each other to bear each other's losses, and confine insurance to corporations. Many activities in which natural persons engage and have a right to engage without necessity of statutory authority may be forbidden by statute.

But California has expressed no public policy against reciprocals. It has found no evil in that method of operation, and it has not seen fit to prohibit it. What the Assigned Risk Law does to appellant is to threaten to deprive private individuals of the right to engage in cooperative self help in order to coerce them into succumbing to what would be an unconstitutional imposition if done directly. *The deprivation is here a penalty for refusal to succumb and not the exposition of a public policy.*

Osborn v. Ozlin, 310 U.S. 53, relied on by the court below and discussed at p. 42, *supra*, may be noted again. The statute there did not compel the issuance of insurance, and the prohibition involved was not an instrument to compel what the state could not directly command. As this Court said (pp. 65, 66):

"The present case, therefore, is wholly unlike those instances in which a 'so-called right is used as part of a scheme to accomplish a forbidden result.' *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426, 434. For it is clear that Virginia has a definable interest in the contracts she seeks to regulate and that what she has done is very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state power matters unrelated to any local interests."

No Decided Case Sustains the Legislation Here Assailed

We have said (p. 32, *supra*) that the decided cases which directly involved the power of a State to compel an insurer to contract with unwanted risks support appellant, and that there are none to the contrary.

The court below cites a Massachusetts opinion and certain Texas cases.

The former, *In re Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681, was not a decision in a controverted case but was merely an advisory opinion to the legislature. Advisory opinions are not precedents. They arise outside of any factual controversy and are given without benefit of argument by counsel.* For example, the opinion does not even mention the leading case, *National Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71 (discussed p. 32, *supra*), which may not have been called to the court's attention.

Even apart from this fact, the opinion is neither in point nor persuasive. The court was careful to restrict its approval of the statute to the narrow basis that the insurers there were *corporations* whose charters might be altered, amended or revoked at any time, at the pleasure of the state. Under the Massachusetts Constitution every corporate charter issued since 1831 has been subject to the reserved power of the state to change or alter the corporate rights and duties. Only because of this reserved power was the proposed legislation approved.

Thus the court said:

"The proposed act is confined in its scope to motor vehicle liability policies and bonds obligating corporations.

*For these reasons the Massachusetts courts have repeatedly said that if a controversy does arise involving the constitutionality of a statute, the court will sedulously guard itself against any influence of an advisory opinion previously given by it; *Green v. The Commonwealth*, 12 Allen 155, 164; *Building Inspector of Lowell v. Stoklosa*, 250 Mass. 52, 145 N.E. 262; *Mayor of Lynn v. Commissioner of Civil Service*, 269 Mass. 410, 169 N.E. 502.

... If in the original charters of such corporations the substance of sections 3 and 4 of the proposed act had been inserted, they would have been made the conditions upon which the corporations came into existence and accepted their franchises. A corporation can raise no questions as to the constitutionality of a proceeding in accordance with the charter which it was content to accept. Having consented to come into being subject to these limitations, it could not be heard to complain of them. . . . Every charter of a corporation granted since March 11, 1831, is subject to amendment or alteration, and every corporation organized under General Laws is subject to such laws as may hereafter be passed affecting or altering its rights or duties. G. L. c. 155, § 3. All insurance or surety corporations established since 1831 took their corporate existence subject to these provisions of law and cannot complain of their exercise. . . ." (147 N.E. at 700)

"... It follows that a statute such as that here proposed, as to the board of appeal and its powers, would be valid *in the main* in its effect on existing domestic insurance corporations or such as may be hereafter organized. . . .

"That which a state may do with corporations of its own creation, it may do with foreign corporations admitted to do business within its borders as a condition of their continuance of business, provided in other respects no constitutional obstacle is encountered." (701)*

A subsequent decision, *Factory Mut. Liability Ins. Co. v. Justices of S. Court*, 300 Mass. 513, 16 N.E.2d 38, shows that the court was thinking not only of corporations but of the fact that they are engaged in the business for profit.†

We have seen (at p. 54, *supra*) that a state's power over corporations is no measure of its power over others.

*The very broad effect of this Massachusetts constitutional reservation of power over corporations was long ago noted in *Greenwood v. Freight Co.*, 105 U.S. 13, at 17.

†"... no company attempting to engage in this business can . . . limit its operations to that part of the field in which there is the least risk and the most profit." (16 N.E.2d 38, at 40)

Nothing in the reasoning of the Massachusetts court lends support to the application of the Assigned Risk Law to appellant so as to compel it to insure non-members of the Association. Mr. Justice Frankfurter (then Professor Frankfurter) has pointed out in "A Note on Advisory Opinions," 37 Harvard Law Review 1002, that advisory opinions are particularly deplorable in constitutional controversies. "The stuff of these contests are facts, and judgment upon facts." That is as sound a criticism of opinions sustaining legislation as of opinions striking it down. The abstract discussion in the Massachusetts opinion has no relation to the unique facts of the present case that appellant is not a corporation, but a cooperative aggregate of individuals, that it was "formed . . . solely for the purpose of making insurance available" to members of the Association, "has at all times thereafter existed solely for that purpose" and has in practice consistently so limited itself (see pp. 6-8, *supra*).

The particular issue involved here has never been raised in Massachusetts in any case, and the issue discussed in the advisory opinion has never been raised there in any *controverted* case. In the other Massachusetts case cited by the court below, *Factory Mutual Liability etc. Co. v. Justices*, *supra*, the insurer was a foreign corporation which had come into the state and been licensed to do business after the enactment of the compulsory insurance law. The constitutional question was not raised.

"Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511; *R. Simpson & Co. v. Commissioner*, 321 U.S. 225.*

*Appellee has cited *Ex Parte Poresky*, 290 U.S. 30, as sustaining the constitutionality of the Massachusetts statute. That case involved only the provision of the statute requiring automobile drivers to obtain insurance as a condition to being permitted to drive. That is an entirely different question.

Even though the Massachusetts court restricted its opinion to corporations, it confessed that the statute "constitutes serious limitations upon customary methods of conducting the insurance business," "a great interference with freedom of contract" and went "to the verge of power" (147 N.E. at 701). For that reason later, in *Neustadt v. Employers Liability Assurance Corporation*, 303 Mass. 321, 21 N.E.2d 538, the court declined to construe the statute so as to extend to brokers the right to compel issuance of insurance.

Moreover, later decisions of this Court discredit the reasoning of the Massachusetts advisory opinion, even as applied to corporations. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, applying the doctrine of unconstitutional conditions, was decided a year afterwards. Nine years later, in *Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629, 634, this Court, referring to *Frost*, made it clear that a state

"might have denied to foreign corporations admission to the State. But it may not enforce any part of the charter of a domestic corporation or any provision of its laws relating to admission of a foreign corporation that is repugnant to the Federal Constitution."

In *Coombes v. Getz*, 285 U.S. 434, six years after the Massachusetts opinion, this Court reversed the Supreme Court of California which, in sustaining the constitutionality of a statute repealing an existing stockholder's liability, grounded its decision upon a provision of the California Constitution similar to that of the Massachusetts Constitution upon which the opinion of the Massachusetts judges was placed.

In *Employers Liability Assurance Corp. v. Frost*, 48 Ariz. 402, 62 P.2d 320, the Arizona court took heed of *Frost Trucking Co. v. Railroad Commission*, supra, and, in holding unconstitutional a law compelling a corporate insurer to grant insurance, said:

"The state, if it so chooses, may prohibit a foreign insurance company from entering the state, but, if it permits it to enter, it must not impose conditions which require such in-

surance company to relinquish any of its constitutional rights." (p. 323)

The Texas cases referred to by the court below are decisions of intermediate courts. In none of them was the constitutional question presented, argued, or discussed. The first case, *Texas Employers Insurance Association v. United States Torpedo Company*, 8 S.W.2d 266 (Tex. Civ. App.), involved a public body created as a state agency for the purpose of issuing workmen's compensation insurance to any applicant. It did not involve the rights of any private insurer. The basis of the affirmance, 26 S.W.2d 1057 (Tex. Comm. App.), was that "the association had been created for the sole purpose of carrying out the provisions of this law." (p. 1058). In the course of the opinion, it was remarked that "we are unwilling to give assent to the assumption that a private insurance company" had different rights than the public agency (p. 1059). But this was pure dictum, for no private company was involved.

The later Texas cases merely repeat the dictum.

Even the dictum is not in point because the court was speaking only of corporations, and it was speaking of workmen's compensation insurance, which, unlike other kinds of insurance, is a creature of statute. The very statute that gave birth to that kind of insurance specified, at the moment of its birth, who might issue such policies and that if any corporation wished to write this newly-created type of insurance it should be prepared to do so for everyone. (See 26 S.W.2d at 1059.)

In *Employers Liability Assurance Corporation v. Frost*, supra, the court stated that while courts had gone far in upholding the right of a state to regulate and control the insurance business,

"we have found no case where the facts, as here, call for a decision on the power of the Legislature to make it mandatory upon an insurance company . . . to insure all risks. . . ."
62 P.2d 320 at 324.

This observation is precisely correct.

VII.

Public Policy Does Not Permit the State to Impose on Private Parties the Burden of Effectuating Public Ends

Much is said by the court below about "public policy." It is said that with the growth of highway traffic there has been an increase of automobile accidents and large losses to injured persons at the hands of those who are uninsured and unable to respond in damages. This problem, it is said, has led many states to require licensing of drivers and either compulsory insurance or proof of financial responsibility as a condition to issuing of licenses (R. 173). We are then told that these requirements have made it necessary that insurance be made available to those who want it.*

Public interest certainly warrants keeping law breakers and reckless drivers off the highways or doing so unless they are insured. But it is a dubious step to say that the public interest therefore requires that insurance be made available to bad risks and bad drivers. It would seem that the way to protect the public from bad drivers is to prevent them from driving rather than to make it possible for them to continue to drive.†

*California has a Financial Responsibility Law (Vehicle Code, Sec. 419-420.9), but it was enacted July 8, 1947, *after* the enactment of the Assigned Risk Law. The latter was enacted February 17, 1947, effective immediately, and was amended June 30, 1947. Appellee argued below, anachronistically, that the Assigned Risk Law was necessitated by the Financial Responsibility Law. The court below does not make this error and does not connect the two statutes but refers to earlier and less sweeping legislation.

Moreover, as stated in a review of this case in "Survey of California Law", 1949-1950 (College of Law, University of Santa Clara) at p. 108, "the California Financial Responsibility Law is not a compulsory insurance law."

†Throughout the country not a few insurance executives have been raising that cry. *Best's Insurance News*, January 1948, contains an address before the Massachusetts Association of Insurance Agents by Mr. John A. Diemand, President, Insurance Company of North America, in which he stated (p. 96):

"It is one thing to say: 'All who drive must be financially responsible.' It is quite another to add to this 'and all have a right

The question whether public policy requires that insurance be made available to all who wish it may be for the legislature to decide. But if the legislature is free to decide what constitutes public policy, the Fourteenth Amendment does not leave it wholly free in deciding how the policy is to be fulfilled.

The legislature cannot, we submit, fulfill this public policy at private cost.

If insurance should be made available, it might be appropriate for the State, through a state fund, to make it so. It is one thing

to become financially responsible through insurance. Yet practice has shown an increasing tendency on the part of administrative officials, through use of the technique of assigned risks, to come quite close to making this amendment. . . . Do you imagine that if all of these risks were sound from an underwriting standpoint there would be any necessity for their assignment? . . .

"I think you will find that at least a partial and very plausible explanation for the desire of casualty insurers to withdraw from compulsory automobile writing lies in the tendency of automobile licensing officials to overlook fitness as a driver in favor of financial responsibility gotten through a forced assumption of risk by insurers. That there is a countrywide official attitude of indifference to driving competence is borne out by the facts recited in the Saturday Evening Post article entitled 'License to Kill.' It is not a proper function of the business of insurance to shoulder the cost of preserving substandard social conduct; and the members of that business should not be compelled to perform such disservice to the public.

"The state cannot save its conscience by providing for payments in the event of loss of life or injury to third parties. Its efforts should be directed toward prohibiting the known careless and indifferent automobile operator from having access to any type of motor vehicle at any time."

The same issue contains the presidential address before the National Association of Independent Insurers by Mr. Adlai H. Rust, in which he said (p. 33):

"The problem of the proper administration of an Assigned Risk Plan under present day conditions has engaged the attention of and been of concern to many companies upon several occasions during this past year. There is considerable foundation for feeling that some of the problems in that field that exist today are occasioned by

"(1) A general reluctance to recognize the fact that there are thousands of individuals granted a license to drive an automobile that are unfit to enjoy that privilege.

"(3) An inclination to pass the whole burden of this problem on to the insurance carriers, rather than for the various

to say that reckless drivers may freely drive the highways, imperiling the lives and property of the public, not at their own risk and expense but at the risk and expense of the public. It is quite another to say that they may do so at the risk and expense of private parties. And whatever may be said about placing the expense on commercial insurers organized for profit, it is still more extreme to impose that expense on a group of careful drivers cooperating to insure themselves and thus to keep down the cost of their own insurance.

To argue that the state may validly give relief to one group by compelling another to bear its burdens is to embrace totalitarian notions—no matter by what high sounding phrases it is glossed over—and it becomes necessary to let perceptive minds like Mr. Justice Holmes remind us, as he did in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416:

"We are in danger of forgetting that a strong public desire

states to do the things that are really necessary to remove the many unfit drivers from our highways."

In *Best's Insurance News*, March 1948, Mr. Ray J. Mills, President of the Iowa Mutual Liability Insurance Co., is reported as saying (p. 31):

"So by inference, the governor tells the insurance industry that they must furnish insurance to incompetent, reckless and drunken drivers. But I say to the governor that providing insurance for reckless and drunken drivers won't keep them from killing and crippling the citizens of his own and other states and it won't lower the rates which safety minded drivers must pay. . . .

"What's the answer? Obviously it is strict enforcement of driver's license and safety responsibility laws. . . . Agents are in a position to influence public opinion to the end that incompetent and drunken drivers will be kept off the road. That is the primary purpose of safety responsibility laws. If one of these drivers asks for insurance, tell him why he is not eligible for it, instead of trying to get some company to issue a policy for him. Talk to policyholders about their driving habits, let them know that they, as a part of the public make their own rates and finally get them to talking about removing unsafe drivers from the roads instead of demanding that some company or the state provide insurance for them."

To the same effect, *Pacific Insurance Magazine*, November 1948, p. 32, reporting Harold B. Jackson, President of Banker's Indemnity and Chairman of the National Committee for Traffic Safety, in an address at the annual meeting of the American Motor Vehicle Administrators, assailing assigned risk plans.

to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Justice Holmes also warned against the "natural tendency of human nature" to extend too far the immunity of the police power from the Fourteenth Amendment (p. 415):

"... The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

If this is so of "regulation that goes too far"—in the *Mahon* case a prohibition of a particular kind of use—what of legislation that leaps beyond regulation to the wholly different species, compulsion to contract, to associate with unwanted partners, to assume others' liabilities?

Public policy must be fulfilled at public cost. If the affirmative act of an individual creates a problem, the cost of its removal may possibly be imposed on him. Otherwise not. Thus the cost of eliminating grade crossings may be imposed on the railroad whose traffic creates the risks to be eliminated. But it may not be so imposed where the purpose is to facilitate construction of high-speed highways, to aid unemployment, improve national defense, or make new modes of transportation available to the public. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 417, particularly at 429. There, speaking through Mr. Justice Brandeis, the Court said:

"It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. . . . But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. . . . While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment . . . so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. . . ."

In the present case no one asserts that a cooperative group of individuals banded together to insure each other works an evil on any one or that it receives any benefit from legislation making it possible for inferior drivers to be insured.

The banking business may be regulated and interest rates fixed, but no one would assert that the State, decreeing it to be in the public interest for all people to be able to borrow money, could compel banks to lend to whomever a Bank Commissioner might assign.

**THERE HAS BEEN NO DECLARATION OF PUBLIC POLICY
BY THE STATE IN ANY TRUE SENSE.**

The notion that it is the public policy of California to make appellant insure non-members actually involves a pyramid of fictions.

There is, first, the fiction that the state legislature has truly judged and appraised the problems presented and has selected a solution when in fact it has been a mere instrument for translating the selfish purposes of a pressure group into police compulsion. Second, there is the fiction that the expressions of state power with which we here deal are expressions of the legislature when in fact they represent the arbitrary exercise of power by an

administrative official and a private group antagonistic to the theory of self help through cooperation which appellant symbolizes. They represent a government by decree in the manner of the European dictators and the corporative state.*

Doubtless the first fiction is one behind which the Court may not look. Perhaps this is also true of the second fiction, since the distribution of legislative power among the organs of state government is said to be a matter of state concern. But that rule is not absolute. *Yick Wo v. Hopkins*, 118 U.S. 356 at 366, et seq., indicates that a delegation which is "purely arbitrary, and acknowledges neither guidance nor restraint" violates the due process clause of the 14th Amendment. And cf. *Washington Ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 122, and *Saia v. New York*, 334 U.S. 558.

Here the delegation to the Insurance Commissioner of the power to determine the identity of those whom insurers should be compelled to insure was limited only by such standard as may be spelled out of the words "in good faith entitled." (See p. 13, supra.) This is no standard at all. Until the adoption of the statute no one was entitled to obtain insurance from an insurer who did not wish to give it, and the very purpose of the statute was to entitle some people. Yet the qualifying phrase "in good faith" shows that not all people are "entitled," and as a standard it is meaningless. It was paraphrased in appellee's arguments below

*Dr. Franz Neumann, "Behemoth, The Structure and Practice of National Socialism" (Oxford University Press, 1942), shows how the German republic collapsed and Naziism strangled the land because of "the shift [of] the center of gravity from the legislature to the bureaucracy" (E.g., pp. 24-29, 51, et seq.).

Vyshinsky, "The Law of the Soviet State" (MacMillan 1948), quoting Lenin, jibes (314-315):

"Look at any parliamentary country you like, from America to Switzerland The real state work is done behind the scenes, and carried out by departments, chancelleries, and staffs. In parliaments they merely babble—with the special purpose of fooling 'simple folk'."

as a standard that every person "is entitled to get insurance unless in some fashion his record would show to a person of any sense of reason or balance that he was not." Such a test amounts to no more than the subjective feeling of the Insurance Commissioner that someone is entitled to something to which he was never entitled before. In the language of the New York Court of Appeals (*Lyons v. Prince*, 281 N.Y. 557, 24 N.E.2d 466, 469), there is here no limitation "except the usual implied limitation, to which even legislative bodies are subject, that the determination must be reasonable." As the court there added, that is no standard at all. It is striking that nowhere in the opinion of the court below is there any attempt to define the standard for the Commissioner's guidance.

However, even if the Court should not be free to pierce the fictions, it may recognize that they exist, in judging whether the statute violates due process in other respects.

Here the Assigned Risk Plan was the work of a committee of commercial insurers.* As the court below states in its opinion, "The Assigned Risk Plan [was] proposed by the automobile insurers operating in the state" (R. 178). When this plan, so proposed, was under consideration, and appellant stated its willingness to accede if it were not required to insure non-members, its request was rejected because "not acceptable to the Commissioner nor to the committee" (R. 178).

*Antagonism and jealousy of corporations operating for profit toward cooperatives is nothing new. Cf. Hulbert, *Legal Phases of Cooperative Associations* (Bulletin No. 50, Farm Credit Administration, U. S. Department of Agriculture), p. 2. Efforts to have legislative bodies strip cooperatives of special privileges conferred by law are common. Note efforts of the "Tax Equality League" to induce Congress to repeal the exemption from federal income taxation of cooperatives (House Ways & Means Committee Hearings on Cooperative Organizations, November 4-26, 1947). But the present case affords perhaps the first example of an attempt—not to strip a cooperative of special privileges conferred by law—but to destroy its essential nature as a cooperative.

CONCLUSION

We submit that the decision of the court below presses the power of the state over its citizens beyond any limit heretofore countenanced. It is not an example of an old principle but the creation of a new.

We submit that the California Assigned Risk Law and Assigned Risk Plan, in seeking to compel appellant to insure non-members of California State Automobile Association, and the order of the Insurance Commissioner suspending the appellant's right to transact automobile liability insurance in California because of its refusal to subscribe to the plan, violate the Fourteenth Amendment to the Constitution of the United States. The judgment of the court below should be reversed with directions to enter judgment accordingly.

San Francisco, California,
January 19, 1951:

Respectfully submitted;

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MOSES LASKY,
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BROBECK, PHLEGER & HARRISON,
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(Appendices follow)

Appendices

APPENDIX I

California Assigned Risk Law

(Stats. 1947, Ch. 39, p. 528, as amended, Stats. 1947, Ch. 1208, p. 2714, constituting sections 11620-11627, Insurance Code)

Section 11620:

"The commissioner, after a public hearing, shall approve or issue a reasonable plan for the equitable apportionment, among insurers admitted to transact liability insurance, of those applicants for automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods. The commissioner may approve or issue reasonable amendments to such plan if he first holds a public hearing to determine whether the amendments are in keeping with the intent and purpose of this section. All such insurers shall subscribe to the plan and its amendments and, subject to Section 11621, participate therein.

"Notice of the public hearings required by this section shall be published, not less than ten (10) days nor more than thirty (30) days prior to such hearings, in two newspapers of general circulation, one published in the City and County of San Francisco, and the other published in the City of Los Angeles."

Section 11621:

"Such plan shall not require assignments to be made to an insurer which (a) does not transact automobile bodily injury and property damage liability insurance, (b) has withdrawn from this State pursuant to and in compliance with Article 15, Chapter 1, Part 2, Division 1 of this code, or (c) has discontinued the execution of new or renewal contracts of automobile bodily injury and property damage liability insurance, and has notified the com-

missioner of such discontinuance. In so far as possible, assignments under the plan shall be consistent with the scope of territorial operations and underwriting policies of each subscriber."

Section 11622:

"Such plan shall require the issuance of a policy affording coverage in the amount of five thousand dollars (\$5,000) for bodily injury to or death of each person as a result of any one accident and, subject to said limit as to one person, the amount of ten thousand dollars (\$10,000) for bodily injury to or death of all persons as a result of any one accident, and the amount of five thousand dollars (\$5,000) for damage to property of others as a result of any one accident, but shall not require the issuance of a policy affording coverage in excess of said amounts."

Section 11623:

"To carry out the purpose of this article, the subscribing insurers may form their own organization which shall, subject to review by the Insurance Commissioner, administer and operate the plan. The cost of such organization shall be fairly proportioned among the subscribing insurers to whom assignments may be made."

Section 11624:

"Such plan shall contain:

(a) Standards for determining eligibility of applicants for insurance, and in establishing such standards the following may be taken into consideration in respect to the applicant or any other person who may reasonably be expected to operate the applicant's automobile with his permission:

- (1) His criminal conviction record;
- (2) His record of suspension or revocation of a license to operate an automobile;
- (3) His automobile accident record;

(4) His age and mental, physical and moral characteristics which pertain to his ability to safely and lawfully operate an automobile;

(5) The condition or use of the automobile.

(b) Procedures for making application for insurance, for apportionment of eligible applicants among the subscribing insurers and for appeal to the commissioner by persons who believe themselves aggrieved by the operation of the plan,

(c) Rules and regulations governing the administration and operation of the plan,

(d) Provisions showing the basis upon which premium charges shall be made and

(e) Such other provisions as may be necessary to carry out the purpose of this article."

Section 11625:

"If an insurer admitted to transact liability insurance fails to subscribe to the plan or to any amendments thereto, the commissioner shall give 10 days' written notice to such insurer to so subscribe. If such insurer fails to comply with such notice, then the commissioner may, after hearing upon notice, suspend the certificate of authority of such insurer to transact liability insurance in this State until such insurer does so subscribe. Proceedings under this section shall be conducted in accordance with Chapter 5, Part 1, Division 3, Title 2 of the Government Code, and the commissioner shall have all the powers granted therein."

Section 11626:

"If the commissioner, after hearing upon not less than ten (10) days' notice, finds that any insurer has failed to perform any of the duties required of it by this article or by the plan, other than those duties enumerated in Section 11625, he may issue an order to such insurer specifying in what manner and to what extent he

finds the insurer to have so failed and requiring, within a reasonable time, not less than 10 days, compliance with such requirements. If within the period specified in the order the insurer fails to comply with such order, such insurer shall, in addition to any other penalty provided by law, forfeit to the State a penalty of five hundred dollars (\$500) for each such failure. The commissioner may bring an action in his own name against the insurer to collect the said penalty."

Section 11627:

"In this article, 'insurer' includes reciprocal or interinsurance exchanges."

APPENDIX II

California provisions concerning reciprocals. (Insurance Code)

Section 1300:

"Any persons may exchange reciprocal or interinsurance contracts with one another providing insurance other than life or surety, among themselves against any loss which may be insured against under other provisions of law."

Section 1301:

"Such persons are termed subscribers."

Section 1302 permits corporations to be subscribers.

Section 1303:

"The organization under which such subscribers so exchange contracts is termed a reciprocal or interinsurance exchange."

Section 1304 provides that the name of the organization or of the attorney in fact shall not be confusingly similar to the names of other insurers or attorneys in fact.

Section 1305:

"Such contracts may be executed by an attorney-in-fact, agent or other representative duly authorized and acting for such subscribers under powers of attorney. Such authorized person is termed the attorney, and may be a corporation."

Section 1306 relates to the location of the principal office of the attorney.

Section 1307:

"The power of attorney and contracts made thereunder may:

"(a) Provide for the right of substitution of attorney and revocation of the contract or power.

"(b) *Impose such restrictions upon the exercise of the power as are agreed upon by the subscribers.*

"(c) Provide for and limit the maximum amount to be paid by subscribers, except that contracts of exchanges writing either liability or workmen's compensation insurance shall be subject to the provisions of Article 6 of this chapter.

"(d) Provide for the exercise of any right reserved to the subscribers directly or through a board or other body."

Section 1308:

"The body exercising the subscribers' rights shall be selected under such rules as the subscribers adopt. It shall supervise the finances of the exchange and shall supervise its operations to such extent as to assure conformity with the subscriber's agreement and power of attorney."

Section 1320:

"The attorney shall verify and cause to be filed with the commissioner copies of the following forms used by the exchange:

"(a) The form of the power of attorney.

"(b) The form of each application for insurance and the form of each contract for exchange of indemnity;

"(c) Every amendment to such forms."

Section 1450:

"The exchange may sue or be sued in its own name as in the case of an individual. Any judgment rendered against the exchange shall be binding upon each subscriber only in such proportion as his interests may appear."

APPENDIX III**California provisions referred to in section relating to jurisdiction
Constitution, Article VI:**

Sec. 4: The Supreme Court . . . shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal, which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision, as hereinafter provided. . . .

Sec. 4b: The district courts of appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the superior courts are given original jurisdiction; also . . . in proceedings of mandamus. . . .

Sec. 4c: The Supreme Court shall have power . . . to order any cause pending before a district court of appeal to be heard, and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within 15 days in criminal cases, or 30 days in all other cases, after such judgment shall have become final therein. The judgment of the district courts of appeal shall become final therein upon the expiration of 15 days in criminal cases, or 30 days in all other cases, after the same shall have been pronounced.

Code of Civil Procedure:

Sec. 961: The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all civil actions and proceedings in all courts of this State. . . .

Rules on Appeal:**Rule 27:**

(a) The Supreme Court or a District Court of Appeal may grant a rehearing in any cause after its own decision; and any cause pending in a department of the Supreme Court may be ordered heard by the Supreme Court in bank. A rehearing or hearing in bank may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion, prior to the time the decision becomes final therein.

(b) A party seeking a rehearing in a criminal case in the District Court of Appeal must serve and file a petition for rehearing within 8 days after the filing of the decision. A party seeking a rehearing in any other case, either in the District Court of Appeal or in the Supreme Court, or a hearing by the Supreme Court in bank after a decision in department, must serve and file a petition therefor within 15 days after the filing of the decision. The same number of copies shall be filed as is required by Rule 16.

* * * * *

Rule 28:

(a) Within 30 days in criminal causes, and 60 days in other causes, after the filing of a decision of the District Court of Appeal, the Supreme Court, on its own motion, or on petition, may order the cause transferred to itself for hearing and decision.

(b) A party seeking a hearing must serve and file a petition therefore within 22 days in criminal causes, and 40 days in other causes, after the filing of the decision of the District Court of Appeal.

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**In the Supreme Court of the
United States**

OCTOBER TERM 1950

No. 310

**CALIFORNIA STATE AUTOMOBILE ASSOCIATION
INTER-INSURANCE BUREAU,**

Appellant,

vs.

**JOHN R. MALONEY, INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA, substituted
for Wallace K. Downey,**

Appellee.

Appellant's Reply Brief

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vs.

JOHN R. MALONEY, INSURANCE COMMIS-
SIONER OF THE STATE OF CALIFORNIA, sub-
stituted for Wallace K. Downey,

Appellee.

Appellant's Reply Brief

The purpose of this reply brief is to draw together appellee's argument to see just what it is and where it joins issue. We think that in this way the lack of merit in his case will reveal itself.*

Appellant's opening brief will be referred to by the symbol "O.B.," and appellee's brief by the symbol "A.B."

*We shall pass by matters in appellee's brief that could be the subject of comment, e.g., the fact that it goes outside of the record in assertions of fact, even referring to events said to have occurred after the close of the hearing in this case (see footnotes 4, 12, and 25 at A.B. 6, 16, and 38).

Appellee states the test of constitutionality under the due process clause to be this: If a statute is the exercise of the police power,[†] has a proper purpose and object in the interest of the public welfare, and is not unreasonable, arbitrary or capricious, and if the means selected have a real and substantial relation to the object sought to be attacked, it is constitutional (A.B. 17).

But the law has devised the technique of pricking out a line from case to case in order that terms such as "proper," "unreasonable," "arbitrary," "capricious," "real and substantial relation" may gain intelligibility in specific situations.

In our opening brief we showed that these terms, when applied to this kind of case, that of statutory compulsion to serve, associate and contract, necessarily result in the conclusion of unconstitutionality.

It is therefore necessary to see how appellee advances from his generalities to their application. This we now proceed to do.

1. Public Policy May Not Be Achieved at Private Cost.

The essential basis of appellee's case may be summarized in his own words:

"The social interest of the people of California in the protection of highway accident victims and their dependents, and the economic burden on the public purse when adequate compensation is not available to the victim or his dependents are obvious." (A.B. 38, end of footnote 23.)

And more bluntly (A.B. 40):

"the statute and plan [are] reasonable and appropriate to the obvious and legitimate social ends to which it tends, indemnity for innocent victims of highway accidents and insurance protection to the automobile drivers and owners from drastic license penalties and loss."

[†]The term "police power" is but another name for the power to govern, the whole power of state government other than the power to tax and the power of eminent domain. It must be exercised within the Fourteenth Amendment.

But this justification of the statute is, we submit, its own condemnation.

In our opening brief we submitted (O.B. 24) that

"the statute is seen to be, in essence, the same as one which prescribes that after a judgment should be rendered for damages against an uninsured driver, that judgment should be paid pro-rata by careful drivers."*

The foregoing quotations from appellee's brief confess the truth of this observation. They are a frank statement that because it is deemed to be public policy that innocent victims of highway accidents be compensated, a group of careful drivers who desire only to help each other must pay damage judgments, arising not from their own fault but from the fault of others with whom they have had no conceivable nexus or relationship.

We dealt with this kind of argument in our opening brief (at pages 66-70). We repeat, in summary, that public policy must be served at public cost and not at private cost, that the state may not compel natural persons to devote their property to public functions or to convert their free associations into organs of the State.

As indicated by Mr. Justice Holmes for the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, a man's misfortunes or necessities will not justify shifting the damages to his neighbor's shoulders,

2. Appellant Cannot Constitutionally Be Compelled to Insure Non-Members, Because That Is Beyond the Scope of Its Voluntary Dedication.

Immediately following the passage quoted above, that public policy favors indemnity for innocent accident victims, appellee rounds out his argument by asserting that "Insurance is a means

*Appellee calls attention to Sections 11580 and 11581 of the California Insurance Code, which permit successful plaintiffs in personal injury suits to collect directly from the defendant's insurer (A.B. 14). These sections underscore our statement.

of providing the indemnity and protection," and that "the insurance companies are in the business of providing it" (A.B. 40). Ergo, they may be compelled to provide it.

At this point a major flaw in the argument is revealed: *Appellant is not in the business of providing indemnity and protection to the public*. It operates solely to provide such protection and indemnity to the members of the State Automobile Association. In our opening brief we said that if the concept of "public utility" were to be discarded as the criterion of compulsory service, and if the same power of compulsion were applied to insurance, "it might conceivably be said of insurers engaged in business for profit, that they have already offered to do business with the public generally, that they are 'common insurers,' and therefore that the lay can require them to serve within the full ambit of that offer." (O.B. 46, 47). But, we pointed out, that argument can have no relation to appellant, because its dedication since its inception has been to serve only members of the Association.*

When he confronts the question directly, appellee admits that one cannot be made a public utility by legislative fiat, that one's status as a public calling is created by the fact of his own voluntary dedication, and that even a public utility cannot be compelled to serve beyond the limits of its dedication (A.B. 72, particularly 74). Necessarily, then, the fact that appellant's voluntary dedica-

*Appellee quibbles that appellant has not confined itself to members but to members and firms and corporations of which members are partners or officers (A.B. 7). The word "members" was used in our brief—and obviously so—as including such firms and corporations (cf. O.B. 7, 8). The opinion of the court below uses the word in the same sense (R. 175, quoted at O.B. 10).

Appellee also quibbles that it is not appellant's power of attorney that has always limited it to insuring members of the Association but its rules and regulations. (A.B. 76). The power of attorney incorporates the rules and regulations by reference (see O.B. 7, 8).

Appellee even argues that appellant can change its rules and regulations. This says no more than that appellant can expand its voluntary dedication if it wishes. The same could be said of any private carrier. But since appellant has not done so, it cannot be compelled to do so.

tion has been limited to the members of the Association should be a firm obstacle to application of the statute to it so far as it compels contracts with non-members.

Appellee therefore seeks to escape the consequence in three ways:

First, he parts company with the court below. The court sought to substitute legal fiction for fact in deciding what appellant's dedication has been (see O.B. 48-51). Since dedication is a pure question of fact, the court, erred in its law.* Appellee concedes the law and makes no attempt to support the court's reasoning on the subject. Instead, he assails the unassailable by denying the fact; he asserts that "there is no evidence in the record or anywhere else, that appellant * * * has dedicated its services to any particular group." (A.B. 75). This but asserts that black is white. We are content to call attention to the findings (quoted, O.B. 7) and to the statements and opinion of the court below that appellant has always "adhered, strictly, to its policy of insuring only members of the California State Automobile Association" (R. 175, quoted O.B. 10), and that "appellant has heretofore insured only a select group" (R. 193, quoted O.B. 49).

Second, appellee denies that the statute runs afoul of the rule that one cannot be compelled to serve beyond his dedication because it does not require appellant to serve any man who walks in off the street and only requires it to insure such people as may be assigned to it (A.B. 57-62). This is a pointless distinction.

*The fundamental law is stated again in a decision of the California Supreme Court rendered February 9, 1951, *Samuelson v. Public Utilities Commission*, 36 A.C. 686. The Court annulled an order of the Commission commanding a carrier to cease and desist from highway carriage. The Commission erroneously held him to be a common carrier because his activities were not "substantially restricted." The Court held that the correct test "requires an unequivocal intention to dedicate property to public use. * * * the question of the carrier's intention is a primary factor in determining the character of carriage * * *." (696). "The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently * * *." (p. 693). The court cites *Frost v. Railroad Commission*, 271 U.S. 583.

The essential fact is that the statute compels appellant to serve beyond its voluntary dedication, and it may not constitutionally do so whether it attempts to throw appellant open to the wide world or to a small segment. Cf. *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403.*

Third, appellee makes an argument wholly at war with his concession that one cannot be compelled to serve beyond his voluntary dedication. He states that "failure to voluntarily dedicate the business to the public service was no barrier to proper regulation" (A.B. 75). This, of course, is true, but appellee would have the court conclude that failure to make such dedication is no bar to compulsion to serve. This is a complete non-sequitur.† No case is cited that supports it. On the contrary the cases recognize a clear line of demarcation between regulation, however broad, and compulsion to serve (O.B. 34, 37-40). Appellee cites *Fordham Bus Corporation v. United States*, 41 F. Supp. 712, but we ourselves cited that case as stating the difference (O.B. 40). In simple fact, appellee slips quite away from the question whether one can be compelled to serve against his will to a discussion of the power to regulate, which includes the power to prohibit or curtail the exercise of rights (A.B. 49-52, 72).

Appellee cites cases like *Brass v. Stoeser*, 153 U.S. 391 (at A.B. 48, 51). The case pertained to a warehouse, a kind of business

*Appellee's argument and discussion (A.B. 55, et seq.) draws attention to another constitutional vice in the Plan (see O.B. 71). Assignments of risks are made by a private citizen, the Plan manager, who in turn is appointed by a governing committee of five, also private citizens selected by the insurers. The committee may capriciously decide whether a risk is or is not such that "his operation of an automobile would endanger public safety"; its "satisfaction" is the test (see A.B. 15, fn. 11). Thus private individuals judge whether appellant must assume risks it does not wish to assume. See *Eubank v. Richmond*, 226 U.S. 137; *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116.

†In the recent case of *Samuelson v. Public Utilities Commission*, 36 A.C. 686, 694 (Feb. 9, 1951) the California Supreme Court, citing *Stephenson v. Binford*, 287 U.S. 251, refers to the difference between the common carrier status and subjection to regulation.

historically subject to the duty of public service, like the carrier and inn keeper.* It involved the validity of rate regulation and not any question of compelling service to those whom the warehousemen did not wish to serve. Brass was willing to store the tendered grain, but not at the rates prescribed by statute (143 U.S. at 391, bottom). The Court took pains to point out (p. 404) that the question of compelling a private warehouse to store for others did not arise because Brass had in the past voluntarily stored for the public. The case is uniformly cited as a rate regulation case.†

Appellee derides the expression "freedom of contract" (A.B. 52, 69). But we have not used that phrase. In the past it has been abused to prevent regulation of contracts by the state, i.e., the regulation of the terms that must go into a contract if one chooses to enter into it, or the prohibition of some kinds of contracts entirely. The present case is concerned, not with freedom of contract, but with freedom from being coerced into entering into the contract at all.‡

*Appellee's history of the subject (A.B. 49) is hardly correct. The inn, the warehouse and the carrier are historical remnants of the medieval "common callings." The duty of public service was later applied to the water, gas and power distributor who operated under public franchise, and a theory of "public utility" was generalized. The common thread of all is the voluntary dedication to serve the public indifferently. See *Wolff Company v. Industrial Court*, 262 U.S. 522 at 535.

†E.g., in *U. S. v. Rock Royal Cooperative, Inc.*, 307 U.S. 533, 570, fn. 46; *Nebbia v. New York*, 291 U.S. 502, 534.

‡Appellee denies that *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, recognizes the difference between the power to regulate and the power to compel service (A.B. 71). He contends that the case merely held that a state could regulate rates even though it had not seen fit to compel service. This assumes that someone had been absurd enough to argue to the Court that, while the state possessed both the less extreme power to regulate rates and the more extreme power to compel service, it could not exercise the less extreme until it had first exercised the more extreme. The basic assumption of the *German Alliance* case is the lack of power to compel service. The fact is shown by a straightforward reading of the passage quoted at A.B. 50. This Court itself has so regarded the case (*Wolff Company v. Industrial Court*, 262 U.S. 522, 537, 538), and it is often cited to that effect, e.g., 11 *Am. Jur.* 1059, Note 7.

3. The Statute Cannot Be Sustained on the Theory That the State Can Demand Compliance as the Price of Permitting Appellant to Continue in Existence.

The court below held (R. 193):

"No company can be compelled to assume a risk. But if it refuses to accept an assigned risk, its right to do business in this state may be terminated."

The court thereby admitted that appellant could not directly be compelled to assume unwanted risks. But it asserted that the state could impose the same compulsion as a condition of continued existence. We showed that this reasoning conflicts with the doctrine of unconstitutional conditions (O.B. 55-60).

It is a striking fact that *appellee does not openly attempt to defend that reasoning*. When confronted directly with our discussion of this very matter, he openly concedes that if the statute is not constitutional as a direct compulsion, he, "of course, cannot claim that the fact that compliance is made a condition of doing an automobile liability insurance business in the State will in itself cure the unconstitutionality" (A.B. 68).*

At this point in his brief appellee rests on the assertion that the statute is valid as a direct compulsion.

But analysis shows that much of appellee's brief proceeds on assumptions directly contrary to the concession just quoted. For example, he sums up a line of argument with these words, "the appellant has the choice of writing automobile liability insurance in California on condition that it accept its equitable proportion of risks * * * or of refraining from doing that business in California" (A.B. 57). This conclusion is rested on the premise that the state can take over the whole insurance business for itself if it wishes (A.B. 45). Perhaps it can. But it does not follow that

*Appellee curiously states that a constitutional statute does not "become unconstitutional because made a condition to doing business in the State" (A.B. 68). Quite true, but an unconstitutional one does not become constitutional because made such a condition.

it can impose on a private person any kind of compulsion as the price of not exercising its power to pre-empt the business.

Appellee invokes cases like *Noble State Bank v. Haskell*, 219 U.S. 104, and *Mountain Timber Co. v. Washington*, 243 U.S. 219 (A.B. 46). In the *Noble Bank* case the state did no more than create a state insurance fund, require banks to insure deposits, and give that fund a monopoly of the insurance. The *Mountain Timber* case, like the *Noble Bank* case, merely made a certain kind of insurance coverage mandatory and created a monopolistic state fund for the purpose.* Similarly, we concede, California can require all motorists to carry insurance, and we have ourselves suggested that the creation of a state fund would be a constitutional way of serving the alleged public policy discussed at pages 2 and 3, *supra*.

It may well be that the State of California can declare it to be public policy that private insurers go out of business entirely or that the reciprocal method of self insurance is inimical to the public interest and must cease. But in fact it has made no such declaration, and it is inconceivable that the people of California would ever countenance legislation that pretended to do so. The state is here merely trying to use deprivation of the right to do business as a club to compel appellant to do what it cannot compel it to do directly.

The doctrine of unconstitutional conditions will not permit it to do so. *And appellee, when brought face to face with the question, has conceded the fact (see p. 8, supra).*

Similarly, appellee argues that the state might compel every

*Appellee says of the statute involved in that case that it was more than a restriction on an insurance company's right to contract, "it was in one leading field of casualty insurance an abolition of the right" (A.B. 46). This is an erroneous characterization. The statute abolished no right of any insurance company theretofore existing. It related to workmen's compensation insurance, which was a creature of the statute. The statute which created the business confined it to the state fund (cf. O.B. 65).

driver to contribute to a state fund to reimburse losses of victims of automobile accidents. But that power is no basis for supporting the kind of legislation here involved. The exercise of that power would be no more than a kind of taxation for a public purpose. And there is a constitutional distinction between achieving public ends by taxation and doing it in other ways. Mr. Justice Brandeis, speaking for the Court, pointed that out in *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405 at 429.

The same tacit disregard of the doctrine of unconstitutional conditions, which appellee will not openly dispute, underlies other of his arguments. For example, he argues that many laws confront one with a choice of complying or going out of business (A.B. 55-57). The fallacy of comparing such situations with the present case is obvious. If the state can directly require that an act be done in a given way if it is to be done, the alternative to doing it in the prescribed way is not to do it at all. Thus the state may prescribe the form of fire insurance contracts, and one either writes insurance on this form or not at all.* By contrast, where the purpose is not to regulate the manner of doing business but to make an unconstitutional compulsion, the choice is not between doing an act in the manner required by law and not doing it. It is a choice between succumbing to an unconstitutional imposition or succumbing to a penalty for refusal (cf. O.B. 60).

Still again, appellee makes assertions such as the following (A.B. 78): "Precious as is the right of freedom of association, it, also, like freedom of contract, may properly be limited by the State when used for purposes contrary to the public policy of the State." But California has seen no evil in appellant's mode of operation. Appellant's operations are not contrary, nor used for purposes contrary, to the public policy of the state (cf. O.B. 60).

*Cf. O.B. 34 where we say that, under the power to regulate, the state "may prescribe the terms that will enter into a contract if one chooses to make the contract * * *. But none of this comprehends power to compel one to contract."

As we have said (O.B. 34), "a cooperative hurts no one by serving only its members." No one claims that any injury, public or private, flows from what appellant does. The State simply wants it to do something else as well.

**APPELLANT'S RIGHT TO DO BUSINESS IS NOT
A PRIVILEGE DERIVED FROM THE STATE.**

Appellee repeatedly asserts that appellant's right to do business is a privilege derived from the state (e.g., A.B. 27). Unless he wishes to deny the doctrine of unconstitutional conditions—which in fact he admits—it is difficult to understand why he makes the assertion. Even then it would be immaterial. This matter of privilege came into the discussion in connection with our statement that "a lawful power of a state—even the power to grant or deny a privilege—cannot be exercised as an instrument to accomplish an unconstitutional result" (O.B. 55), and that, since this doctrine limits a state's power to deny a privilege, *a fortiori* it applies here where appellant's right to do business is not a privilege derived from the state (O.B. 59, 60).

Moreover, appellee's assertion, we submit, is patently unsound (see discussion, O.B. 59, 60). The notion that the liberty of natural persons to do business or to contract with each other is a privilege derived from the state is one that ought to be abhorrent to every American, for it is of the very essence of statism. Under our system the state is made for man and derives its powers from him, not the reverse. A contrary view should not be permitted to be the starting point of any reasoning whatever.

What is the privilege which according to appellee the State of California has granted to appellant and its subscribers? As we have pointed out (O.B. 59), appellant is merely an aggregate of private contracts among persons, called subscribers, who desire to provide themselves with cooperative insurance by agreeing *inter se* to share losses. Noting that the subscribers are liable only to the extent of their annual deposit, unless a reserve fund falls below a certain margin, and then only for a like additional sum

(A.B. 27, 66, 78), appellee would assimilate this to the grant of a corporate charter with its incident of limited liability. Appellee even asserts that "this form of organization exists solely through legislative permission" (A.B. 3).

This reasoning is false. It takes no grant of a privilege from the state for A, B and C to contract with one another to share losses. That is all that a reciprocal is, and reciprocals existed before any legislation on the subject (O.B. 59).^{*} Similarly, it takes no grant of privilege from the state to permit A, B and C, in so contracting with each other, to agree that each one's contribution shall not exceed an agreed amount.

We do not suggest that because the liberty to engage in a given activity is not based on a grant of privilege, it cannot be regulated. The state may doubtless provide that if reciprocal contracts are made, the limit of each subscriber's commitment shall be something larger than he otherwise would wish, as a guard of solvency.

Doubtless, too, as appellee says (A.B. 66), the state may make and change statutory provisions governing reciprocals—perhaps even prohibit them entirely. If it does any of these things, it is exercising a power to regulate. But in no event is it granting a privilege. All such changes would have to be justified on their own. But the power to make them cannot be used as a club by which to coerce acquiescence in an unconstitutional imposition.[†]

^{*}Best's Insurance Reports, Casualty, Surety and Miscellaneous (37th annual edition, 1950), p. 741, notes that "the earliest reciprocal insurance exchange has been in active operation since 1881 * * *." It also states that

"In many instances, reciprocal or interinsurance associations or exchanges, which are of comparatively recent origin, have been the result of voluntary agreements, entered into without the benefit of statutory authorization or subject to special legislative regulation."

[†]Appellee asserts that in substance a reciprocal does not differ from a mutual insurance corporation (A.B. 3, fn. 1 and elsewhere). On the contrary, it differs in many material respects. A reciprocal is not a corporation. As said in 29 Am. Jur. 55, 56:

"By the term 'reciprocal insurance,' or 'interinsurance' or 'interindemnity,' as it is sometimes called, is meant that system whereby in-

4. No Decided Case Sustains the Legislation Here Assailed.

Appellee concedes that this Court has never sustained the validity of any statute compelling an insurer to insure persons or risks against its will (A.B. 20).

But it states that "with one exception, whenever these statutes have been passed on by State Courts they have been sustained" (A.B. 17). This is disingenuous. In only one state, Arizona, has the constitutionality of a statute compelling an insurer to grant insurance been in issue in a controverted case, and the Arizona Court held the statute to be unconstitutional (see O.B. 32).

Appellee notes that two states in addition to California—New York and Illinois—have a kind of compulsory assigned risk law for automobile insurance (A.B. 21).^{*} They were adopted only a little while before the California Act, which appellant at once assailed, and neither has come into the courts.

dividuals, partnerships, or corporations, engaged in a similar line of business, undertake to indemnify each other against a certain kind or kinds of losses by means of a mutual exchange of insurance contracts, usually through the medium of a common attorney in fact appointed for that purpose by each of the underwriters, under agreements whereby, as among themselves, each member separately becomes both an insured and an insurer with several liability only. Thus, while the reciprocal system of insurance resembles both Lloyds and mutual insurance, it differs materially from both. * * *"

As said in *Industrial Indemnity Exchange v. State Board of Equalization*, 26 Cal.2d 772, 777, 161 P.2d 222, quoting from an earlier decision:

"From what has been said, it is apparent that a reciprocal 'organization' differs in many respects from the ordinary stock or mutual insurance company."

The California Insurance Code recognizes that reciprocals are on a different footing from other forms of insurance. The code contains a separate chapter on reciprocals and provides (Section 1281) that none of the statutory provisions relating to insurance shall apply to reciprocals except as specifically designated.

^{*}Massachusetts also has a form of compulsory acceptance of automobile insurance risks.

Appellee also notes that the workmen's compensation statutes of four states purport to compel acceptance of risks. But workmen's compensation presents a different question, for reasons noted at p. 9, *supra*, and in our opening brief at p. 65.

Best's Insurance Reports, Casualty, Surety and Miscellaneous (37th annual ed., 1950), p. 741, states that "Some [reciprocal] exchanges restrict their writings to select risks in certain industries, territories or coverages." It follows that many, if not most reciprocals, are open to the general public. This may explain why no one in other states has raised the precise issue that appellant here has raised.*

Appellee discusses at length (A.B. 22-27) the Massachusetts' advisory opinion, *In re Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681. We would not add to the discussion of our opening brief on that subject (O.B. 61-65), except for appellee's effort to attach weight to it by saying that it has been frequently cited in Massachusetts and that the provisions of the Massachusetts act have been litigated. But the opinion has been cited in connection with questions not related to the issue of constitutionality here involved. The statute covered several matters, and the cases cited refer to provisions not here germane.

Appellee cites (A.B. 25) only one other Massachusetts case which he directly asserts involved the constitutionality of the provision requiring insurers to insure risks, *Factory Mutual Liability Ins. Co. v. Justices*, 300 Mass. 513, 16 N.E.2d 38. We submit that appellee misreads the case. The issue of constitutionality was not there raised, controverted, argued or discussed in the opinion.

Appellee also discusses at length the Texas workmen's compensation cases referred to in the opinion of the court below (A.B. 27-31). As we said in our opening brief (p. 65), these Texas cases start, proceed and end with dicta. An annotation in 107 A.L.R. 1422 relates the curious history of these cases, whereby it has come to be said that in Texas insurers must issue workmen's

*Appellee asserts that there are other reciprocals in California (A.B. 4, 5, fn. 3 and 4). Best's Insurance Reports, *supra*, shows only two others besides appellant who write automobile liability insurance, and neither confines itself to a limited group.

compensation insurance, although the issue has never been litigated, argued or reasoned out.

5. The Statute Deprives Appellant and Its Members of Liberty Without Due Process, and It Also Deprives Them of Their Property.

In its statement of the question presented, appellee confines the issue to one of taking property without due process (A.B. 2). The issue is broader and includes the deprivation of liberty.

Having sought to confine the question so, appellee later argues that no question of taking property for public use is presented (A.B. 62-65). And this assertion is based on the claim that there is no showing that appellant will sustain a financial loss on assigned risks.

The answer is twofold:

1. One's liberties are broader than money. To compel one unwillingly to do business or to contract with another, to assume his liabilities or to render service to him, is itself a deprivation of liberty, regardless of financial loss. The adequacy of the receipts does not enter into the question, because the obligation imposed goes beyond the reasonable exercise of the state's power. *Northern Pacific Railway v. North Dakota*, 236 U.S. 593, 595, 596; *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 417.

This Court has often said that to make a private carrier into a public carrier by legislative fiat is beyond the power of state because "it would be taking property for public use without just compensation, in violation of the Due Process Clause of the Fourteenth Amendment," *Michigan Commission v. Duke*, 266 U.S. 570, and other cases cited in our opening brief at page 37. This is stated repeatedly in the authorities, see *Pacific Tel. & Tel. Co. v. Esbleman*, 166 Cal. 640, 699, 137 Pac. 1119, 1142; *Atchison, T. & S. F. Ry. Co. v. Railroad Commission*, 173 Cal. 577, 160 Pac. 828, 2 A.L.R. 975, writ of error dismissed, 245 U.S. 638; *Oklahoma Natural Gas Co. v. Corporation Commission*, 88

Okl. 51, 211 Pac. 401, 31 A.L.R. 330; 109 A.L.R. 556, and is summed up in 43 *Am. Jur.* 588 thus:

"To require a public utility to devote its property to a service which it has never professed to render or to the service of a territory which it has never undertaken to serve is tantamount to taking that property for public use without just compensation."

Cases involving rate regulation or price fixing involve a wholly different consideration (cf. A.B. 65). There one either is free not to sell at all, if he does not wish to do so at the price fixed, or else he has already voluntarily dedicated himself to serve the public. In either event the right to serve against one's will is not involved. The power to regulate the rates being granted, nothing but money is involved in such cases, and monetary loss is the test.

2. In fact, the assigned risks are bad. Much sophistry and pious speculation is answered by one observation: The risks would not come to the Assigned Risk Plan if they were good (see O.B. 14).*

*And see passage quoted at O.B. 67, footnote, "Do you imagine that if all these risks were sound from an underwriting standpoint there would be any necessity for their assignment?"

Appellee asserts that the plan "winnows out the really uninsurable" (A.B. 15, 40). The matters related merely indicate that the plan could be worse than it is, and may be, whenever the Insurance Commissioner sees fit to make it so.

Appellee's assertion is somewhat sardonic in light of the fact that the following are eligible under the plan: Persons convicted of any number of crimes, however recent, if not related to automobile driving; persons convicted more than three years earlier of any number of crimes of any kind; persons convicted at any time of two convictions for driving while drunk or for driving recklessly or at excessive speed resulting in collisions in which third persons were killed or injured or any amount of property damaged; persons convicted once of driving while drunk and once either of manslaughter while driving an automobile or of theft of an automobile, or any felony of any kind in the commission of which an automobile was used (R. 14, 15; Plan. Sections 2431, 2431.1, 2431.2).

In the proceedings below appellant offered certain statistics comparing its own loss ratio with the loss experience under the former voluntary

There is still another fundamental vice in appellee's conception of this matter of financial injury. He apparently conceives that unless the total of all deposits received from assigned risks is less than the total of losses paid out on them, plus costs, appellant and its subscribers have not been financially injured. He overlooks several facts concerning the appellant and the consequences of those facts:

1. Appellant is simply the agency whereby its subscribers insure one another by contract and contribution to a common fund. The surplus left in the fund after payment of losses and expenses is periodically returnable to the subscribers in proportion to their deposits (O.B. 7).
2. Subscribers foisted on appellant by the law will participate in such returns.
3. If the loss ratio on assigned risks is greater to any extent than the loss ratio on voluntarily accepted risks, the proportionate amount returnable to the subscribers is reduced; the savings to them are diluted. Necessarily, the loss ratio on assigned risks is something greater than on others. Otherwise, they would not come through the Assigned Risk Plan (O.B. 14).

The upshot is that the net cost of insurance of the non-assigned subscribers is increased, the careful drivers do not benefit to the full from their own carefulness, and the purpose of appellant's plan, but this evidence was rejected. Appellee justifies the rejection by arguing that the risks assigned through the voluntary plan were the most obnoxious kind of risk, the "worst class" of those eligible under the present plan (A.B. 14), while the compulsory plan includes a "better class of drivers." That they are better as financial risks is pure assumption. It is also irrelevant. Because the risks under the voluntary plan were bad, the premium charge averaged 140% of normal. Still the loss ratio was the ruinous figure of 80%. If some of the assigned risks under the compulsory plan are not so bad, then the premium chargeable will decline toward the 100% bracket. The ruinous loss ratio of 80% was a fraction of which the numerator was the losses and the denominator the 140%. If under the new plan the average risk is not as bad as under the voluntary plan, so that the numerator decreases, the denominator (the premiums) also decreases toward 100%. Losses under the compulsory plan could be as low as 65% of what they were under the voluntary plan, and still the loss ratio would be as bad or worse than the 80% figure, as compared to appellant's 50% loss ratio experience.

creation to supply a cooperative insurance at lowest cost is defeated. No matter by what amount the cost is increased, it is an out-of-pocket deprivation.

Furthermore, appellant's reserve in proportion to the total insurance written is reduced, and thereby its subscribers are brought closer to the possibility of assessments (Cal. Ins. Code, Sec. 1390-1402; see Appendix C of appellee's brief).

Whether some of the assessments are paid then depends on the character and responsibility of persons not selected by appellant but foisted on it. Yet, by the very nature of the Assigned Risk Plan, and in the language of the California Supreme Court (quoted O.B. 24), at least a substantial number of them are obviously careless and financially irresponsible.

The False Issue of Anti-Discrimination.

Appellee states that the plan assigns to insurers not merely those who must have insurance to get a driver's license, i.e., law violators or drunks, but also "members of minority groups, particularly the colored drivers, persons with minor physical disabilities, the young and the old drivers" (A.B. 11, 14). The fact that appellee makes this statement not once but twice suggests a renewal of an attempt made in argument in the court below, but not in the evidence, to inject into this case the issue of racial discrimination.

No evidence of discrimination by any insurer because of color appears in the record nor any evidence that appellant has refused to insure members of the Association, or that the Association refuses membership, on racial grounds.

The issue has no place in the case. The Assigned Risk Law has nothing to do with racial discrimination. It nowhere mentions the subject, the legislative history contains no reference to it, and the provisions of the act are not aimed at it.

Assuming that under the Assigned Risk Plan members of some racial groups would be given access to insurance otherwise not

open, this consequence is incidental, and the terms and general operation of the statute are far more comprehensive. A statute which would be valid if limited to a proper purpose cannot be sustained on that ground if it has other effects not embraced within that justification. *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1.

The constitutionality of statutes prohibiting discrimination because of race, color or religion rests on a different basis and turns on a different set of considerations from any involved in the present case. Such a statute can not sensibly be said to conflict with a constitutional provision having its birth in the same purpose. See O.B. 41, footnote.

CONCLUSION

We submit that the judgment of the court below should be reversed with directions to enter judgment annulling the order and decision of the Insurance Commissioner.

San Francisco, California,
March 3, 1951.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 310

CALIFORNIA STATE AUTOMOBILE ASSOCIATION,
INTER-INSURANCE BUREAU,

Appellant,

vs.

WALLACE K. DOWNEY, INSURANCE COMMIS-
SIONER OF THE STATE OF CALIFORNIA,

Appellee

**STATEMENT OF MATTERS OR GROUND MAKING
AGAINST JURISDICTION OF THE SUPREME
COURT OF THE UNITED STATES AND MOTION
TO AFFIRM THE JUDGMENT FROM WHICH THE
APPEAL IS TAKEN OR TO DISMISS THE APPEAL.**

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IN THE DISTRICT COURT OF APPEAL OF THE STATE
OF CALIFORNIA, FIRST APPELLATE DISTRICT
DIVISION ONE

1 Civil No. 14,078

CALIFORNIA STATE AUTOMOBILE ASSOCIATION,
INTER-INSURANCE BUREAU,

vs. Petitioner & Appellant,

WALLACE, K. DOWNEY, INSURANCE COMMIS-
SIONER OF THE STATE OF CALIFORNIA,

Respondent and Appellee

**STATEMENT OF MATTERS OR GROUND MAKING
AGAINST JURISDICTION OF THE SUPREME
COURT OF THE UNITED STATES AND MOTION
TO AFFIRM THE JUDGMENT FROM WHICH THE
APPEAL IS TAKEN OR TO DISMISS THE APPEAL.**

While the appellee must concede that technical grounds of jurisdiction of this appeal inhere in the Supreme Court of the United States, there remains the question of whether the Federal question here presented is substantial. (Robertson and Kirkham, "Jurisdiction of the Supreme Court of the United States," pp. 95-98, citing *Equitable Life Insurance Co. v. Brown*, 187 U. S. 308, 311, 23 Sup. Ct. Rep. 123, 47 L. Ed. 190)

Appellee contends that no substantial Federal question is presented by this appeal. Appellant raises no question as to "procedural due process", that is, it makes no argument that it did not receive full hearing on adequate notice. Its appeal therefore presents only the one major question of what may be called "substantive due process".

Question Presented—

Appellee contends that the legal question, as presented by appellant on page 3 of its statement as to jurisdiction, is both too narrowly circumscribed, in that it omits reference to one of the two statutes which comprise the legal framework of which the compulsory assigned risk statute is only a part, and is too broadly or ambiguously drawn in its assumption of matters of law and fact which, as hereafter shown, are not justified by the record. Appellee therefore presents the following as its concept of the major issue presented by this appeal:

Where:

(1) A statute provides for the suspension, regardless of fault, of the license of the operator of any motor vehicle involved in an accident in which injury to any person or property damage in excess of \$100 results, unless the operator is insured or puts up a bond or cash deposit;

(2) Another statute, passed at the same session of the legislature, requires that every automobile liability insurer subscribe to and operate under a plan, approved or issued by the State Insurance Commissioner, whereby applicants for automobile liability insurance "who are in good faith entitled to but are unable to procure such insurance through ordinary methods" are to be "equitably" apportioned among those insurers, and such a plan is so approved or issued;

(3) A reciprocal or interinsurance exchange is one of those insurers but fails or refuses to subscribe to the plan, this reciprocal having been organized many years ago by, and having been continuously operated ever since organization by, a particular automobile club (a nonstock membership corporation) of the type common in the United States, for the sole purpose of providing insurance for the members of that club ~~and having continuously, since organization, confined its insurance to such club members; and~~

(4) Pursuant to the statute requiring subscription to the plan, the Insurance Commissioner suspends the certificate of authority of the reciprocal for its failure or refusal to subscribe to the plan, thereby terminating the reciprocal's right to enter into or renew any more contracts of automobile liability insurance:

Does the statute requiring subscription to the plan, or the plan issued or approved pursuant to the statute, or the order of the Commissioner suspending the certificate of authority, violate the Fourteenth Amendment to the Constitution of the United States by depriving the reciprocal or its members of property or liberty without due process of law?

Statement of Facts

(a) Facts Respecting the Differences Between Appellant's and Appellee's Presentation of the Question Here Involved

It will be noted that the foregoing question as presented by appellee differs from appellant's version substantially in respect to the following points:

(1) That while the statute requiring subscription by the insurer to the plan is the one here directly under attack, the statute which subjects the automobile operator to sus-

pension of license in the event of accident, regardless of fault, is viewed by appellant as a vital part of the legal framework, the whole of the framework being part of the true issue here. The Court appears to have taken that view in the opinion under appeal Statement as to Jurisdiction, pp. 26, 41, 43; 96 A. C. A. 973, 981, 994, 995). The provisions of the latter statute are set forth, *infra*, under "(b) The Statutes".

(2) The cooperative nature of the automobile club, to members of which appellant has heretofore confined the issuance of its insurance, and which organized appellant (Statement as to jurisdiction, pp. 4-5): The only evidence in the record as to the nature of the automobile club are exhibits "I", "I-1" and "I-2" for identification, introduced in the transcript of the hearing before the Insurance Commissioner of the State. These—and any judicial knowledge of any court (Cf. *Smythe v. Cal. State Auto Assn.* (9th Cir.), 175 Fed. 752; *Chattanooga Automobile Club v. Commissioner*, 12 Tax Court 967, affirmed U. S. Court of Appeals, 6th Circuit, June 1, 1950, — Fed. 2d —), can only result in the same inference—demonstrate that appellant's affiliate is neither a consumers' nor a marketing cooperative, as that term is commonly understood, but is cooperative only in the sense that any membership corporation carrying on a particular type of activities for the benefit of its members is cooperative; that is, it is a typical automobile club. In the sense in which appellant uses the term, every mutual insurance company and every reciprocal or interinsurance exchange is a "cooperative".

(3) The type of persons to be insured under the assigned risk plan: Appellant's statement that these "risks are so hazardous that no insurer will accept them voluntarily" (Statement, p. 4) is extreme in its nature, and prob-

ably not applicable to the bulk of the risks. Appellee has used the words of the statute in its version of the question. Commissioner's Exhibit "2", introduced at the hearing before the Commissioner, the Plan itself, in Sections 2430 to 2431.8 (California Admin. Code, Title 10) excludes what appear to be the really perilous risks. (See the court's digest of these provisions in the opinion. 96 A. C. A. 973, 984, Statement as to Jurisdiction, pp. 27-30.) Inability to procure insurance by *ordinary* methods does not mean that *no* insurer will take the business. It means that the usual solicitation by an agent or broker does not produce a carrier. There is no requirement that applicants must take special measures which will exhaust the insurance market before applying under the Plan (California Admin. Code, Secs. 2440, 2442 (a)). These risks as a class are substandard from an underwriting point of view, but it cannot, on the basis of any present known data be said that they are so hazardous that *no* insurer will take them voluntarily.

(4) The use of the term "compel it to issue insurance" (Statement as to jurisdiction, pp. 3-4) in referring to the impact of the statute on the insurer. Appellant might retort that by the State's means of forbidding issue of further insurance, the insurer is practically compelled to accept the plan. However, there is a difference. There is no "compelling" in the sense in which a water company may be compelled to render service to a home, or a railroad to a shipper. Appellee has therefore phrased the question on this point as confined to the facts in the record.

(5) In reference to subjecting "each participant in the reciprocal to the damage liabilities of the unwanted risks" (Statement as to jurisdiction, p. 4): Again, this is a rhetorical expression which is correct only in the qualified sense that *each one* of the policyholders in a mutual insurance company and *each one* of the policyholders and

stockholders in a stock insurance company is subjected to the damage liabilities of *every* policyholder covered by insurance in the particular company. In this respect appellant's insureds do not differ from those of the various mutual, reciprocal, and stock insurers who write the automobile liability insurance of the California public. Appellant argues that under its power of attorney now in use—the organic document of a reciprocal or interinsurance exchange such as appellant—each member is “bound” for the losses of every other member (Statement as to jurisdiction, p. 16). This is the theory of reciprocal operation, and the theory of the operation as described by the Court (Appendix to Statement as to Jurisdiction, pp. 20-21, 96 A. C. A. 973, 976-977). The point is that the partnership is *limited*.

Appellant's powers of attorney are in evidence (Exhibits “A”, “B”, “C”, “D”, “E” and “G”). Each recites that it is to be exercised in conformity to the Rules and Regulations of the Insurance Board of the Bureau, which rules and regulations are also in evidence (Exhibit “F” at the hearing before the Commissioner). Clause (6) (c) of the rules and regulations provides for the securing of a certificate of non-assessability from the Insurance Commissioner. This is to secure the insured an immunity from assessment under Section 1401, California Insurance Code, which reads so far as pertinent:

“If an exchange subject to this article has a surplus of admitted assets over all liabilities in a sum equal to one and one-half times the minimum paid-in capital required of incorporated insurers issuing policies on a reserve basis and doing the same classes of insurance, then the Insurance Commissioner, upon written request, shall issue his certificate stating such fact. Subscribers at an exchange so certified shall have no liability for assessment on policies issued while such certificate remains in effect. • • •”

The validity of such a limitation on assessment of policyholders appears to be settled under California law. (*Miller v. Johnson*, 4 Cal. 2d 265, 48 Pac. 2d 956.)

It follows that, since the insureds of appellant cannot be assessed to pay losses each is "bound" only to the extent of the premium deposit specified in his policy just as a policyholder in any other type of insurer is "bound" only to the extent of the premium specified in his policy. This being the case, the theoretical insurance of each by all the rest of the insureds ceases to be any distinguishing element in the question, since appellant's insureds are in substantially the same position as to losses as in the case of any policyholder of any insurer.

(b) *The statutes*

To assist the Court in achieving a full picture of the operation of the assigned risk plan here under attack, we supplement appellant's mention of the provisions of the plan (Statement as to jurisdiction, pp. 5-6) by quoting sections 2495 and 2498 thereof (Cal. Administrative Code, Title 10):

"2495. Any applicant, insured or insurer under the Plan who is affected by any act, ruling, decision or order of an insurer, the Manager or the Committee, and believes such act, ruling, decision or order to be in conflict with or not authorized by the provisions of the Plan or by the law, may appeal in writing in the first instance to the Committee, setting forth his grounds for such belief. If any member of the Committee is an officer, employee or other representative of an insurer which is a party to the matter, the other members of the Committee shall designate another person representative of the same group or class of insurer represented by such Committee member to replace him for the purpose of hearing the appeal. The Committee shall review all evidence and consider all statements, argu-

ments, and contentions at a hearing upon not less than five days' notice to the parties to the matter, and within five days thereafter shall notify such parties of its decision which shall be binding upon all parties, subject to appeal to the Commissioner.

"If any party to a matter which has been so appealed to the Committee is dissatisfied with the decision of the Committee upon such appeal, he may appeal to the Commissioner who shall hear the parties, review the matter and render a decision which shall be binding upon all parties."

"2498. Every insurer admitted to transact liability insurance shall subscribe to this Plan. Such subscription shall be filed with the Commissioner not later than the effective date of this Plan or upon application for admission to transact liability insurance and shall be in the following form:

"Whereas, the Insurance Commissioner of the State of California, after public hearing upon published notice, has approved and issued, pursuant to Article 4, Chapter 1, Part 3, Division 2 of the California Insurance Code, a plan for the equitable apportionment, among insurers admitted to transact liability insurance in the State of California, of those applicants ~~for~~ automobile bodily injury and property damage liability insurance who are in good faith entitled to but are unable to procure such insurance through ordinary methods, which plan has been designated as the 'California Automobile Assigned Risk Plan' and is by reference incorporated herein and made a part hereof, and

"Whereas, the undersigned is an insurer which either is presently admitted to transact liability insurance in the State of California or has applied for Certificate of Authority or renewal Certificate of Authority to transact liability insurance in the State of California and is required by the provisions of Section 11620 of said Code to subscribe to and participate in such Plan.

"Wherefore, pursuant to the provisions of said Section ~~11620~~ of the California Insurance Code, and in consideration of its admission to transact liability insurance in the State of California, the undersigned insurer hereby subscribes to said California Automobile Assigned Risk Plan and agrees to participate therein in accordance with the terms thereof.

"This subscription and agreement shall be deemed to have been executed in the State of California and the interpretation and enforcement thereof shall be governed by the laws of that State.

"In witness whereof has to these
(Name of Insurer)
presents affixed its seal and caused its name to be subscribed and attested by its

(Title of Officer)
and on the day of 194...
(Title of Officer)

.....
(Name of Insurer)

By

.....
(Name of Officer)

(SEAL)

Attest:

.....
(Name of Officer)

(Title of Officer)."

Appellant, as mentioned above, does not set forth the sections of the California Vehicle Code which subject an uninsured driver to suspension of driver's license when he is involved in an accident. So far as pertinent, these read as follows at the time of enactment of the statute here under attack (Amendment in 1949 has not changed the

obligation imposed on the driver, being primarily for clarification):

"420. Security Required Following Accident. (a) The department shall, within 60 days after the receipt of a report of a motor vehicle accident within this State which has resulted in bodily injury or death or damage to the property of any one person in excess of one hundred dollars (\$100), suspend the license of each operator of a motor vehicle in any manner involved in such accident, and if such operator is a nonresident the privilege of operating a motor vehicle within this State, unless such operator shall deposit security in a sum which shall be sufficient in the judgment of the department to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against such operator or owner. Notice of such suspension shall be sent by the department to such operator not less than 10 days prior to the effective date of such suspension and shall state the amount required as security.

"(b) Subdivision (a) shall not apply under the conditions stated in Section 420.1 or to any of the following:

"(1) To such operator if the owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident:

"(2) To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him:

"(3) To such operator if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the department, covered by any other form of liability insurance policy or bond; or

"(4). To any person qualifying as a self-insurer under Section 420.7.

"(c) No such policy or bond shall be effective under this section unless issued by an insurance company or surety company authorized to do business in this State, except that if such motor vehicle was not registered in this State, or was a motor vehicle which was registered elsewhere than in this State at the effective date of the policy or bond, or the most recent renewal thereof, such policy or bond shall not be effective under this section unless the insurance company or surety company, if not authorized to do business in this State, shall execute a power of attorney authorizing the director to accept service on its behalf of notice or process in any action upon such policy or bond arising out of such accident; provided, however, every such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, or not less than five thousand dollars (\$5,000) because of bodily injury to or death of one person in any one accident and subject to said limit for one person, to a limit of not less than ten thousand dollars (\$10,000) because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, to a limit of not less than one thousand dollars (\$1,000) because of injury to or destruction of property of others in any one accident.

"(d) Upon receipt of notice of such accident, the insurance company or surety company which issued such policy or bond shall furnish for filing with the department a written notice that such policy or bond was in effect at the time of such accident."

The Question at Issue Does Not Present a Substantial Federal Question

It is respectfully submitted that while this Court has not directly passed upon the question, the highest Courts

of two major industrial States have asserted the power of the State to impose even more drastic conditions, as to acceptance of risks, upon continuance of the business. In *re Opinion of the Justices* (Mass., 1925), 251 Mass. 569, 147 N. E. 681; *Factory Mutual Liability, etc. Co.*, (Mass., 1938), 300 Mass. 513, 16 N. E. 2d 38; (Tex., 1928), *Texas Employers' Ins. Assn. v. U. S. Torpedo Co.*, 8 S. W. 2d 266; *Harris v. Traders and General Ins. Co.*, (Tex., 1935), 82 S. W. 2d 750. The statutes involved in those cases required acceptance of every applicant to a particular insurer, instead of, as in this case, providing equitable apportionment among all insurers writing the particular type of insurance.

The only published case denying this power to the State appears to be *Employers' Liability Assurance Corp. v. Frost* (Ariz., 1936), 48 Ariz. 202, 62 Pac. 2d 320. This case, however, rests also upon another ground, i.e., the discrimination in the application of the power made by the statute involved, between types of insurance companies. It fails to notice any of the above Massachusetts or Texas cases above published prior to its date. (96 A. C. A. 972, 986-987, Appendix to Statement as to Jurisdiction, p. 4.)

While this Court has recognized the power of the State to subject the cooperative type of insurance company, such as appellant, to regulation (*Hoopeston Canning Co. v. Cullen*, 318 U. S. 313, 63 Sup. Ct. Rep. 602, 87 L. Ed. 777), and while this Court has not passed directly on the question involved, it has inferentially recognized the State's power in this respect by refusing to require the convening of a three-judge Court to consider the question as to whether the insured could be required to procure such insurance as a condition to being permitted to drive his automobile. *Ex parte Poresky*, 290 U. S. 30, 54 Sup. Ct. 3, 78 L. Ed. 152.

In that case the statute involved in the Massachusetts cases cited above was under attack. Leave was sought to file a petition for writ of mandamus requiring a Federal District Judge to convene a three-judge court under section 266 of the Judicial Code. The petitioner had filed suit in the United States District Court against various officers of the State of Massachusetts to enjoin enforcement of the Massachusetts compulsory automobile liability insurance statute. Petitioner alleged that the Registrar of Motor Vehicles of Massachusetts had refused to register his automobile because he had not posted bond nor procured liability insurance as required by the statute and that he could not comply with the statute. The District Judge had dismissed the complaint for lack of jurisdiction as there was no diversity of citizenship and *no substantial Federal question*.

This Court in a *per curiam* opinion denied leave to file the petition, saying:

... the District Judge clearly has authority to dismiss the want of jurisdiction when the question lacks the necessary substance and no other ground of jurisdiction appears. Such was his authority in the instant case, in view of the decisions of this Court bearing upon the constitutional authority of the State, acting in the interest of public safety, to enact the statute assailed * * * (citing U. S. Supreme Court cases) * * * See, also, Opinion of the Justices, 251 Mass. 569; 147 N. E. 681 * * * (290 U. S. 30, 32, 54 Sup. Ct. Rep. 3, 78 L. Ed. 152.)

The statute involved required, on the one hand, that every person registering an automobile in Massachusetts must furnish a surety bond or an insurance policy to cover liability for damages arising out of operation of the vehicle and, on the other hand, that an insurance company writing automobile liability insurance in that State must, upon his

application, furnish the insurance to that person, subject only to justification for refusal before a State Board. (Chap. 90, General Laws of Mass., *Opinion of the Justices, supra.*)

Since this Court has held that no substantial Federal question is presented by the requirement that the automobile owner procure the insurance, it would appear that no substantial Federal question is presented by the requirement that the insurers make it available to him, particularly where, as in this case, the imposition of the duty upon the insurer is accompanied with provision for equitable distribution of that obligation.

It is therefore respectfully submitted that the Federal question here involved lacks substance and therefore gives no jurisdiction.

MOTION.

Accordingly, appellee does now hereby move that the judgment here under appeal be affirmed, or, in the alternative, that this appeal be dismissed.

Dated: August 11, 1950.

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 HAROLD B. HAAS,
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In the Supreme Court
OF THE
United States

OCTOBER TERM 1950

No. 310

CALIFORNIA STATE AUTOMOBILE ASSOCIA-
TION INTER-INSURANCE BUREAU,

Appellant,

vs.

WALLACE K. DOWNEY, Insurance Com-
missioner of the State of California,

Appellee.

On Appeal from the District Court of Appeal of the
State of California, First Appellate District.

BRIEF FOR APPELLEE.

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In the Supreme Court

**OF THE
United States**

OCTOBER TERM 1950

No. 310

**CALIFORNIA STATE AUTOMOBILE ASSOCIA-
TION INTER-INSURANCE BUREAU,
*Appellant,***

vs.

**WALLACE K. DOWNEY, Insurance Com-
missioner of the State of California,
*Appellee.***

**On Appeal from the District Court of Appeal of the
State of California, First Appellate District.**

BRIEF FOR APPELLEE.

QUESTION PRESENTED.

The law of a state provides that when a driver of a motor vehicle is involved in a traffic accident his license to drive may be suspended without hearing and, if judgment against him results, may be permanently revoked, unless he is covered by automobile

liability insurance up to certain minimum limits at the time of the accident, or thereafter posts assets or a surety bond sufficient to cover a possible judgment within those limits. The law of the same state, as a condition to licensing an insurer to issue insurance covering liability for automobile accidents, requires it to insure, up to the same minimum limits, an equitable proportion of those applicants for insurance who are in good faith entitled to such insurance but are unable to procure it through ordinary methods. Is the latter requirement a violation of the due process clause of the Fourteenth Amendment?

If this law is not such a violation, as to insurers generally, are the circumstances under which appellant is organized and has heretofore operated such as to make the application of the law to it a taking of its property without due process of law?

**SUPPLEMENTATION OF APPELLANT'S
"STATEMENT OF THE CASE"**

A. Identity and nature of appellant. (Br. of App., pp. 6-8.)

The Court below commented in some detail concerning the nature of appellant as an organization. (R. 172.) However, because of contentions made by appellant (Br. of App., pp. 59-60), we would add the following: The form of business organization, of which appellant is an example, appears to be peculiar to the insurance business. In appellant's case, its members derive, from applicable legislation, the same

immunity to liability that members of a mutual corporation have, i.e., they are immune to any personal liability except for the premium deposit stated in the policy.¹ While technically unincorporated, this form of organization exists solely through legislative permission. While it may be technically a limited partnership, the limitations are such that its members' obligations are no greater than those of any mutual insurance corporation, and are less than those of such corporations where membership imposes a liability to assessment in addition to premium stated in the

¹See the extensive note on "Reciprocal or Interinsurance" in 94 A.L.R., pp. 836-855. Legislative regulation prescribing the manner and method of operation of such organizations was sustained by this Court in *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313. California, ever since 1941, has provided that such reciprocals meeting, in effect, stock insurance company financial standards may secure a certificate from the Insurance Commissioner and that holders of policies issued while the certificate is in effect shall be without "assessment" liability, i.e., without liability other than for their premium deposit. (Cal. Ins. Code, Sec. 1401, Appendix C hereof.) The powers of attorney executed by appellant each recite that it is to be exercised in conformity to the rules and regulations of the Insurance Board of the Bureau. (Ex. A, R. 57 and 111-111A; Ex. C, R. 60 and 118-118A, Ex. E, R. 62 and 125-126A; Ex. G, R. 64 and 134-134A.) Such rules, now in effect, have required appellant to secure such a certificate. (Ex. F, rule 6 (c); R. 62 and 130.) Even if such certificate was revoked, each of appellant's members would be liable only for an amount equal and in addition to his premium deposit (R. 131) on policies renewed or *initially issued after revocation*. (Cal. Ins. Code, Sec. 1398, Appendix C.) This is, of course, vastly different from a partnership liability. The difference exists solely by reason of the legislation under which appellant is operating and under which it insists it is entitled to continue to operate. As the Court remarked in the opinion here under attack, the differences of appellant from a mutual insurance corporation are "in mechanics of operation and legal theory, rather than in substance." (R. 172.) The position of its members who are the real parties before the Court if it be no entity, and whom it represents here if it be an entity—does not, in substance, differ from that of members of a mutual insurance corporation. It is a type of mutual insurance company.

policy.² Because of the importance of these statutes to appellant's claims, we print the provisions pertinent to these limitations of members' liability in Appendix C to this brief, in supplementation to those printed in Appendix II of the brief for appellant. (For explanation of the application of these sections to appellant's membership, see ftn. 1.)

Likewise, the sense in which the term "cooperative" is used by appellant (Br. of App., pp. 3, 6) should be clearly understood.

The California State Automobile Association, the organizer of appellant, and whose directors constitute appellant's governing board, is not a consumer's cooperative in the popular or legal sense of the term, but a nonprofit membership corporation. It is licensed as a motor club under the California Insurance Code.³

Appellant, likewise, is a cooperative *type* of insurer as is, in the same sense, any mutual insurance corpo-

²Cf. Cal. Ins. Code, Sec. 7015 re county mutual fire insurance companies; Sec. 4045 re mutual fire insurance companies.

³The pleadings in the trial Court, the findings of the trial judge, and the evidence admitted show that California State Automobile Association is a corporation (R. 2, paragraph "3"; R. 34, second paragraph "III"; R. 43, paragraph "II"); that the membership of its board of directors is, or at the time of the hearing in this case before the California Insurance Department was, identical with that of the governing board of appellant (R. 70-71); that said governing board of appellant is elected by that same board of directors, i.e., elects itself (R. 58; Ex. "B" in R. 59 and 113; Ex. "D" in R. 61 and 119; Ex. "F" R. 62 and 127); and that said association is a "motor club," as defined by the California Insurance Code (R. 2, paragraph "2"; R. 43, paragraph "II"; cf. Cal. Ins. Code, Secs. 12142-12311). That code provides for the making of such organizations of contracts to render certain services to motorists in aid of motoring, but its

ration or reciprocal or interinsurance exchange. Such cooperative types of insurers, at the time of enactment of the statute here attacked, were writing over

insurance services are limited to the selling or giving of an insurance policy in connection with club membership. (Cal. Ins. Code, Sec. 12156.) It cannot itself issue insurance contracts. (Cal. Ins. Code, Sec. 700.)

Since appellee has contended from the beginning—and still does—that the matter of appellant's connection with California State Automobile Association was irrelevant to the question of whether or not appellee was obliged to subscribe to the assigned risk plan, it was successful, at the hearing before the insurance department, in excluding from evidence the proffered articles of incorporation and by-laws of that Association. (R. 69, 70, 101.) The trial Court agreed with this ruling. (R. 5, paragraph commencing "16" and R. 45, Finding "IX.") However, if we disregard these rulings and examine the articles (R. 69, 74, 135, 137), we find that the Association could not today qualify as a "cooperative corporation" under California law, since its purposes (R. 137-138) do not include the matters required by California Corporation Code, Section 12401, fail also to state the matters required by Section 12492 of that code, and that Association has not amended its articles as provided in Section 12206 thereof. No evidence was offered that said Association apportions its earnings to its members as provided by Section 12805 of that code, a characteristic of a co-operative.

It is hardly necessary to state that the Association is not an agricultural marketing association under Chapter 4 of Div. 6 (Secs. 1190-1221) of the California Agricultural Code.

It follows that under California law the Association could not today include the word "cooperative" in its corporate name. (Cal. Corp. Code, Secs. 12950, 12955, 12956.) Ever since 1939, a "cooperative corporation" in California law has had reference to consumer's cooperatives and agricultural marketing cooperatives. (Cal. Corp. Code, Sec. 12201, Cal. Ag. Code, Sec. 1193.)

The said articles and by-laws of California State Automobile Association (R. 137-152) show no sign of any connection with appellant. The connection is entirely governed by appellant's rules and regulations, cited above in this note. These can be amended by two-thirds of appellant's governing board at any regularly called meeting. (R. 125, paragraph "(16)".)

That both the Association and appellant are a cooperative membership type of organization, as distinguished from stock companies doing business solely for the profit of the stockholders, is readily conceded by appellee. But appellant shares this characteristic with all other mutual insurance corporations and reciprocal insurance exchanges who issue a material portion of the automobile liability insurance written in California. (See footnote 4, *infra*.)

twenty-two per cent of the automobile public liability and property damage insurance written in California.⁴

⁴See the 79th Annual Report of the California Insurance Commissioner covering the calendar year 1946. It shows the following automobile property damage and public liability insurance premium written in California during that year:

Property damage (p. 276)	\$20,714,973.90
Public liability (p. 284)	48,904,916.30

Total	\$69,619,890.20
Of this appellant wrote:	
Property damage (p. 272)	\$ 798,966.84
Public liability (p. 280)	2,007,291.25
	\$ 2,896,258.09

At that time, then, appellant wrote a fraction over 4% of the entire California automobile public liability and property damage premium.

Again, it should be noted from that same report that of the \$69,619,890.20 total automobile liability and property damage insurance written in this State, over 22+ % was written by insurers of the nonprofit mutual type, such as appellant. The figures are clear:

Property damage by mutuals (p. 269)	\$ 11.50
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Property damage by reciprocals (p. 269)	220,196.47
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Property damage by mutuals (p. 272)	1,681,843.21
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Property damage by reciprocals (p. 272)	
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California insurers	3,535,438.56
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Other insurers	6,399.92
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Total	\$ 5,433,889.66
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Public liability by reciprocals (p. 278)	\$ 419,339.39
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Public liability by mutuals (p. 280)	4,843,465.05
--------------------------------------	--------------

Public liability by reciprocals (p. 280)	
--	--

California insurers	5,284,465.46
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Other insurers	13,906.22
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Total	\$10,561,176.12
--------------	------------------------

Total automobile liability and property damages written by insurers of this type

\$16,005,065.78

Of this total of automobile and property damage written by non-

Again, it should be noted that appellant's assertion (Br. of App., p. 7) that "it has never insured a non-member" of the California State Automobile Association is contrary to the trial Court's finding, quoted immediately preceding that assertion, that it insures *corporations or firms in which members are officers or partners*. This distinction has already been forcibly called to its attention by judicial comment. (*Smythe v. Cal. State Auto. Assn.* (9th Cir.), 175 Fed. (2d) 752.) It permits appellant to insure many commercially used automobiles.

B. The statutes involved, and the history and background thereof.

As pointed out by the Court below (R. 173-176), not one but several statutes are involved in a single plan or scheme for the protection of persons involved in highway accidents. These statutes deal with the problem from two aspects: (1) Requiring the driver to procure insurance or to post cash or a surety bond; and (2) requiring insurers to participate in a plan for making liability insurance, in a modest minimum limit, available to drivers. It is the second aspect of the statutes that is attacked in this proceeding. Its ultimate justification, however, may be the existence of the first aspect.

profit mutual type insurers appellant wrote \$2,806,258.09 (see above, this note) or over 17 per cent.

Under the voluntary plan risks were assigned to the member insurers in proportion to automobile property damage and bodily injury insurance writing of each member during the previous year. (Sec. 83, R. 163-164.) Under the compulsory plan here under attack, the bodily injury only is used as a basis. (Sec. 244, R. 21.)

(1) Security by the driver: At the beginning of the California legislative session of 1947, there were three of these statutes in effect:

(a) In 1929 there had been enacted a statute, known as the "Financial Responsibility Law," providing that upon non-payment of a judgment for personal injury or certain property damage arising out of operation of a motor vehicle, the driver's license should be suspended not to be reinstated until the judgment is paid and either liability insurance, a surety bond or cash is furnished to cover future driving. In the same year legislation also imposed liability with the same corresponding penalty on the owner of the vehicle when driven with his consent. (Cal. Stats. 1929, ch. 258, sec. 4.) These statutes were eventually codified as sections 402 and 410-418, California Vehicle Code, and are printed, as in effect when this action was brought, in Appendix A hereto.

(b) In 1935, sections 5 to 7 of the "Highway Carriers Act" and sections 4 to 6 of the "City Carriers Act" were adopted to require a highway truck operator to secure liability insurance, cash, or a bond, in certain minimum limits as a prerequisite to a license for commercial carriage of goods by motor truck. (Cal. Stats. 1935, ch. 312, p. 1057; Deering's California General Laws, Act 5134; Cal. Stats. 1935, ch. 223, p. 878, Deering's Calif. General Laws, Act 5129a.) These sections are also printed in Appendix A hereto.

Between 1929 and 1942, therefore, a for hire or public carrier truck operator either procured insur-

ance or posted cash or bond, before he could operate. Any other driver operated without insurance or bond at peril of losing his driver's license in the event of an accident resulting in a judgment against him. (Cal. Veh. Code, sec. 410.) If such a judgment was issued and he paid it up to the amount required, he could not keep or secure a license to drive without first securing the insurance policy or bond, or posting the required amount in cash. It is true that these laws could not be described as compulsory insurance so far as the ordinary driver was concerned. He could register his automobile and procure his license without insurance—but at peril of losing his license if he failed to pay a judgment and if he paid it, then the insurance became compulsory for the future. In short, the uninsured driver without considerable financial resources staked his right to drive upon his luck in keeping free of such a judgment. It is common knowledge that insurance company underwriters are by nature cautious people, not given to taking chances, and, inasmuch as the average annual automobile liability insurance premium runs under a hundred dollars, the underwriter declines a risk with the slightest tinge of what, to him, constitutes undesirability, without wasting money investigating the actual hazard in the particular case. As a result, one such accident would make such insurance difficult to procure.

Consequently, in 1942, by united action of all the automobile liability insurance companies licensed in California, there was organized a voluntary assigned risk plan, with the blessing of the California Insur-

ance Commissioner. (R. 152.) To this plan appellant was a subscriber and, consequently, issued insurance to the applicants assigned to it.⁶

This voluntary plan was limited to assignment of risks required to obtain insurance in order to drive or operate. (R. 152-153, sec. 1 of plan.) Appellant has attacked the "standard" for acceptance of risks into the compulsory plan (R. 194-200) and even does so before this Court. (Br. of App., pp. 70-72.) Hence,

⁶75th Ann. Rep. of the California Insurance Commissioner, p. lxxviii.

"The method by which appellant maintained its standard of requiring all its insureds to be members of the California State Automobile Association while at the same time participating in the first assigned risks plan is shown by the testimony of E. B. De Golia, Director of that Association and member of appellant's governing board:

"Q. And you also know, do you not, that there were risks accepted under the voluntary assigned risk plan by the California State Inter-Insurance Bureau which were not members of the California State Automobile Association?

A. The risks were taken and the applicant was then required to join the Association.

Q. But the risks were taken first?

A. I do not know that procedure; I do not know how that follows; but I do know the Committee was instructed then to see that the person applying for membership in the Bureau should join the Association.

Q. And it is your testimony then that every member who received insurance through the Assigned Risk Plan with you during the period when the Inter-Insurance Bureau was a participant therein did join the Association?

A. So far as I know, yes, sir." (R. 77.)

While the trial Court found that the hearing officer did not err in rejecting the offer of the voluntary plan in evidence (Finding "IX", R. 45, referring to paragraph "16", R. 5, of Appellant's Petition for Writ of Mandate) and the District Court of Appeal affirmed (R. 203), the latter Court did discuss the voluntary plan to the extent of noting the limited class of persons covered. (R. 174-175.) To that extent it must be regarded as impliedly modifying the finding as to respondent's (appellant's) Exhibit I and treating the same as in evidence, despite the initial rejection (R. 87) at the departmental hearing.

it is interesting to note that the standard set up by the insurers, including appellant (Br. of App., p. 10), in a contract under which they agreed—without compulsion of law—to take risks assigned them (sec. 43, R. 160-161; sec. 70; R. 162-163), was “risks that *in good faith are entitled to insurance*”. (R. 156, sec. 22; R. 152, sec. 1; *emph. sup.*) In 1943, the California legislature made special provisions for registration of the plan and clarified certain technical aspects. (Cal. Ins. Code, secs. 1110-1113.)

The voluntary plan, limited to the driver who was required to procure insurance in order to get a license, did nothing for the driver who had not been in trouble but nevertheless could not get insurance because he was a member of a class or group of persons whom conservative underwriters would not accept because, as a class, they felt the risk was greater than normal. The California District Court of Appeal referred to “members of minority groups, particularly the colored drivers, persons with minor physical disabilities, the young and the old drivers”. (R. 174.)

This was the situation at the commencement of 1947, when appellant withdrew from the voluntary plan. (R. 77, 106.)

(2) Requirement of insurers' participation: At that 1947 session, the legislature enacted an emergency compulsory assigned risk law with the urgency clause partially quoted in appellant's brief (Br. of App., p. 9), and which recites, in effect, that appl-

lant's withdrawal from the voluntary plan created the urgency by breaking up the voluntary plan. There is no question that the urgency was felt to be pressing, since the bill was introduced January 22 (California Assembly Journal, 1947, p. 647)⁷ and finally passed by the Houses February 5 (A.J., 1947, p. 1398).

Meanwhile an attempted amendment of the bill to exclude appellant from its operation had been beaten in the State Senate.⁸

This bill enacted Chapter 39 of the California Statutes of 1947, and comprised most of the matter which subsequently appeared in sections 11620 and 11627, California Insurance Code, as quoted in Ap-

⁷The Court can notice facts appearing from the Journal of the Assembly, since a California Court has judicial notice of these journals and the legislative history of statutes. (*French v. Senate*, 146 Cal. 604, 80 Pac. 1031; *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; *People v. Sterling Refining Co.*, 86 Cal. App. 558, 261 Pac. 1080; *People v. Pagni*, 69 Cal. App. 94, 230 Pac. 1001.)

⁸The fact that the legislature considered and rejected exemption of appellant from the plan is emphasized by the action of the State Senate on a proposed amendment to that bill on January 31, 1947:

"Senator Carter moved the adoption of the following amendment:

Amendment No. 1

On page 1, line 19 of the printed bill . . . insert

"As used in this article, the designation "insurers admitted to transact liability insurance" shall not include an insurer whose transactions are controlled by a power of attorney from its subscribers which restricts its subscribers to the members of a limited, specified group of automobile owners and operators; provided a certified copy of such power of attorney is on file with the commissioner."

Senator Cunningham moved that the amendment offered by Senator Carter to Assembly Bill No. 611 be laid on the table.

The roll was called, and the motion carried by the following vote: . . . (Senate Journal, 1947, p. 665.)

pendix 1 to Brief of Appellant herein. This was the prompt action by the legislature referred to in the Court's opinion. (R. 175.)

However, two other developments had occurred: On January 14, a week before the introduction of Assembly Bill 611, the author of Assembly Bill 611 had introduced Assembly Bill 291, almost identical in substance with No. 611. (Assem. Journal, 1947, p. 367.) Only two weeks later, on January 31, he was a co-author of Assembly Bill 1819, which proposed drastically to increase the severity of the Financial Responsibility Law by providing for suspension, without a hearing, of an uninsured driver who was involved in a traffic accident.¹⁰ (Assem. Journal, 1947, p. 996.)

Assembly Bill 291, the compulsory assigned risk law here under attack, and which was itself made amendatory of the urgency bill above referred to, and Assembly Bill 1819, the amendment to the Financial Responsibility Law, were introduced but seventeen days apart, had a common author, were both presented to the Governor on June 20 (Assem. Journal, 1947, pp. 5258, 5259) and were both signed by him on July 8. It is true that while both bills were undergoing the legislative process, the urgency bill was introduced and enacted, but we do not believe, in view of this history, that it can be questioned that the

¹⁰This was the bill which as finally passed enacted Sections 420 et seq., Cal. Veh. Code, printed in Appendix A. It should be noted that there is here no contention as to the constitutionality of this statute. (*Escobedo v. State of California*, 35 Cal. (2d) 870, 222 Pac. (2d) 1; cf. *Ex parte Poresky*, 290 U.S. 30.)

compulsory assigned risk law must be interpreted in the light of the amendments to the Financial Responsibility Law enacted at the same session, or can it be said that there is anything "anachronistic" (Br. of App., p. 66 ftn.) in appellee's claim that each was enacted in contemplation of the other, in view of this legislative history.

Attention should also be directed to the fact that California has in effect made the injured party a direct beneficiary in all public liability policies by providing for direct proceedings against the insurer on a judgment against an insured tort-feasor. (Cal. Ins. Code, secs. 11580-11581, printed in Appendix D hereto.)

C. Character of the risks assigned under the law.

Appellant's brief (Br. of App., p. 14) does not give a fair picture of the risks eligible to assignment under the plan. As we mentioned above "members of minority groups, particularly the colored drivers, persons with minor physical disabilities, the young and the old drivers" (R. 174) are eligible.

The urgency clause relied on by appellant (Br. of App., p. 9) is taken from the urgency bill hurriedly adopted during February of 1947, as mentioned above, for the purpose of saving a break-up of the voluntary plan. It dealt with the worst class of those eligible to the present plan, those whose license had been suspended under section 410, Vehicle Code (see Appendix A hereto), i.e., who had had a judgment suffered

against them for personal injury, or for property damage exceeding \$100 arising out of a traffic accident.

These risks were characteristic of the voluntary plan, which was limited to those required to obtain insurance in order to be licensed. (R. 152-153, 174-175.) The compulsory plan contains extensive exclusionary provisions to winnow out the really uninsurable (R. 15-19), such as narcotic users, drunkards, habitual traffic law violators, defective cars, persons with major physical handicaps, transporters of gasoline and explosives, etc.¹¹ Appellant itself brought out the fact that the average number of applications under the voluntary plan was 230 a month, but during the first month and ten days of operation under the plan here under attack, over 800 applications were received and the manager expected about 1,000 a month thereafter. (R. 92.) In short, about three-fourths of the applicants under the present plan would not have been eligible under the voluntary plan because they were not subject to section 410, Vehicle Code, i.e., were not required to procure insurance in order to drive. It is notorious, for instance, that un-

¹¹Cf., R. 14-19, and particularly Section 2451.8 of the plan, reading as follows:

"2431.8. An applicant is not in good faith entitled to insurance if, upon the basis of investigation by the insurer to which the risk is assigned, it is determined to the satisfaction of the Committee that the accident record, conviction record (criminal and traffic), age, and physical, mental (fel 29), or other condition of the applicant or anyone who normally or usually drives the automobile, considered as a whole, are such that his operation of an automobile would endanger public safety."

derwriters dislike to issue liability insurance to members of minority groups for fear of jury prejudice if they become defendants in liability suits. Similar situations can easily be visualized in cases of minor physical handicaps. (See rules 2431.55 (R. 16-17) and 2432-2437 (R. 18-19.) Thus the great majority of risks under the compulsory plan are not of the class described in the urgency clause upon which appellant relies.¹²

¹²In view of appellant's persistent contention that great loss will be suffered by it from acceptance of these assigned risks, attention should also be directed to the facts available. One of these is the plan permits premium charges considerably higher than those against the usual driver (but see below). The rule permits the application of the "rules, rates, minimum premiums, rating plans and classifications which the insurer . . . normally applies . . . to risks not subject to the plan. (R. 25; Rule 2460.) As pointed out by departmental counsel at the hearing, these might include such added charges as 5% additional to the regular rate because of minority of a driver or 50% additional because of a conviction of drunkenness. (R. 89-91.) To this "manual" premium (i.e., compiled by computation from the rules, classifications, and rates set forth in the insurer's manual for determining premium or rate), the plan permitted an additional charge of "10% for long haul trucking risks and 15% for all other risks" (R. 25, Rule 2460.) Furthermore, in case of the unusual situation where the manual in use by the insurer does not call for surcharges to meet particular hazards, such as minority, or where these surcharges are insufficient because of some hazard not barred by the exclusionary rules (R. 14-19), the insurer can make proper charges with the approval of the governing Committee of the plan (R. 25, Rule 2461), subject, of course, to appeal to the Commissioner (R. 30-31, Rule 2495) from a refusal of approval.

Experience, however, has shown that part of the surcharge was unnecessary and, upon petition of the insurers involved, has been eliminated.

This Court may take judicial notice of official actions which directly affect the matter in issue. (*Gibbes v. Zimmerman*, 290 U.S. 326; *Cal. Code Civ. Proc.*, Sec. 1875(3); *O'Neal v. Senbury*, 24 Cal. App. (2d) 308, 74 Pac. (2d) 1082.) It may thus take notice of an order of the California Insurance Commissioner, dated January 5, 1951, which amended Section 2460 of the plan (R. 25) to eliminate the special surcharge added to the insured's pre-

SUMMARY OF ARGUMENT.

I. The statute and plan here under attack conform to this Court's prescription of standards for determining constitutionality of State police power legislation. A number of States have enacted similar statutes. With one exception, whenever these statutes have been passed on by State Courts they have been sustained. The exception was unsound in its law as to the basic point here involved, was also based on a ground not here involved. This Court has long held that police power statutes having a proper purpose and object in the interest of the public welfare will be held constitutional if the law is not unreasonable, arbitrary or capricious and the means selected have a real and substantial relation to the object sought to be attacked. A long line of cases, which involved legislation requiring acceptance or prompt rejection of hail insurance applications, regulated or took over the business of workmen's compensation insurance, imposed public service obligations upon grain elevator operators, provided for regulation of fire insurance rates, and many regulations of various practices in the insurance business, have shown that regulation

mum for the privilege of assignment in certain of those cases and of the notice on which it was based. As the plan started operation in January, 1948 (R. 92), this order would be based on over two years' experience under the compulsory plan. The notice and order are printed as Appendix B hereto. It should be presumed that such order was supported by evidence justifying it. (*Cal. Code Civ. Proc.*, Sec. 1963(15); *Caminetti v. Guaranty Union Life Ins. Co.*, 52 Cal. App. (2d) 330, 129 Pac. (2d) 159; *Pacific States Co. v. White*, 296 U.S. 176.) Under these circumstances a speculation that the assigned risks experience will cause such loss as to be confiscatory of appellant's property is untenable.

analogous to the legislation here under attack is constitutional. These cases have established also that this Court makes no distinction as to constitutionality between legislation which compels the making of a contract and legislation which merely prohibits a particular practice. It also establishes the principle that voluntary dedication of business or property to public service is not essential to the constitutionality of legislation imposing obligations of service upon that business or property.

II. The legislation here under attack does not impose upon appellant or upon any other insurer any obligation to serve the general public. The legislation itself and the plan promulgated pursuant to it are both carefully drawn to provide that a member of the public cannot make any demand of service upon any particular insurer, that the obligation of such service is equitably proportioned to the volume of business done in the State in the particular field of insurance by each insurer, that the uninsurable risks be excluded, and that the premiums charged be adequate.

III. No question of the taking of property for public use without compensation is presented here. The appellant offered no evidence which would make even a *prima facie* showing of confiscation, and no issue on that point arises here.

IV. Appellant's conduct of the insurance business and its method and form of organization exist only by virtue of legislation. Its members are exercising the privilege of limiting their liability on the obligation

tions of appellant to the same extent as members of mutual corporations, and the transaction of the insurance business by appellant is itself a privilege conferred and not a natural right of its members.

V. The doctrine of "unconstitutional conditions" is not here involved because the conditions themselves imposed by the legislation upon the privilege of transacting automobile liability insurance are not unconstitutional but are reasonable and appropriate to the achievement of a proper object in the interests of the public welfare.

VI. With respect to a number of facts urged and a number of the cases cited by appellant, while the holdings of the cases and the points of law stated are not necessarily incorrect, factors involved in this problem, such as presence of State legislation not considered in the cases, or the existence of subsequent cases modifying the original statements of law in the cases cited, are not set forth by appellant.

I. THE STATUTE AND PLAN HERE UNDER ATTACK CONFORM TO THE STANDARDS LONG PRESCRIBED BY THIS COURT AS MEASURES OF THE CONSTITUTIONALITY OF STATE POLICE POWER LEGISLATION.

A. DECISIONS OF THIS COURT SUSTAIN A BROAD REGULATORY POWER OF THE STATES OVER THE INSURANCE BUSINESS.

We start with the basic concept that "Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long

been withdrawn from the benefits and caprices of free competition." *Osborn v. Ozlin*, 310 U.S. 53, 65. The cases in this Court have uniformly sustained regulatory laws covering in detail most of the operations of insurance companies.¹³ It is probably true, however, that no case has come before this or any Federal Court which dealt with the validity of a statute by the terms of which an insurance company is required, as a condition to being licensed, to insure persons or risks not originally selected or accepted by it. Below, we discuss the case of *National Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71. It is the closest, of the Federal Court cases, to the situation here involved, but this Court there pointed out that there was no actual compulsion—only timely rejection of applications for insurance was required.

In this case, the legislature of a State has found it necessary to require "a reasonable plan for the equitable apportionment among * * * insurers of applicants for automobile * * * insurance who are in good

¹³In *Osborn v. Ozlin*, supra, the learned justice cited *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389; and *Aetna Ins. Co. v. Hyde*, 275 U.S. 440, on insurance rate regulation; *O'Gorman and Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, on regulation of agents' commissions; *National Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71, on regulation of making of hail insurance contracts, and *La Tourette v. McMaster*, 248 U.S. 465, on regulation of licensing of insurance brokers. Many others may be instanced: *Hardware Dealers' Mut. F. Ins. Co. v. Glidden Co.*, 284 U.S. 151, on regulation of fire insurance policy provisions; *Neblett v. Carpenter*, 305 U.S. 297, on state control of liquidation and rehabilitation; *Orient Ins. Co. v. Daggs*, 172 U.S. 557, on the "valued policy" law; *Whitfield v. Aetna Life Ins. Co.*, 205 U.S. 489, on anti-suicide clauses in life insurance policies; *Hoopston Canning Co. v. Cullen*, 318 U.S. 313, on regulation of reciprocal exchanges as to finances and membership, etc.

faith entitled to but are unable to procure such insurance through ordinary methods". It is evident that the legislature believed such a plan reasonable and necessary, that risks "in good faith entitled to" automobile liability insurance should be apportioned among and insured by insurers who made a business of writing that kind of insurance.

Other States, also, have enacted statutes embodying similar assigned risk plans.¹⁴ In *Osborn v. Ozlin*, supra, this Court said:

"When these beliefs are emphasized by legislation embodying similar notions of policy in a dozen states, it would savor of intolerance for us to suggest that a legislature could not constitutionally entertain the views which the legislation adopts." (310 U.S. 53, 64-65.)

¹⁴Automobile liability insurance: New York Ins. Law Sec. 63, N.Y. Laws 1946, ch. 467; Ill. Rev. Stats. 1946, ch. 95½, Sec. 58m, Ill. Laws 1945, p. 1043.

Workmen's compensation insurance: Mason's Minn. Stats. Sec. 3664-1, Minn. Session Laws 1937, ch. 175, p. 241; Wis. Stats. 1943, Sec. 205.30; 1944 Supp. to Va. Code, Secs. 2154a92, 2154a93, Va. Laws 1944, ch. 384, Secs. 92, 93.

Massachusetts' compulsory automobile insurance law and the Texas compulsory workmen's compensation insurance law which have been sustained in State Court decisions are discussed in the text, supra. It will be seen that both are more drastic curbs on "freedom of contract" than the later developed assigned risk plans.

B. NOT ONLY HAVE STATES ADOPTED LEGISLATION EMBODYING COMPULSIONS UPON INSURANCE COMPANIES IDENTICAL WITH OR MORE DRASTIC THAN THE LEGISLATION HERE INVOLVED BUT THE HIGHEST COURTS OF SEVERAL STATES HAVE ENTERTAINED LITIGATION TO ENFORCE THESE COMPULSIONS.

We have already referred to similar state laws.¹⁵

Perhaps the best reasoned and most pertinent discussion of that nice adjustment of the liberties and rights involved under such a law, an adjustment which is the essence of all decisions on the constitutionality of such exercises of the police power, is found in a Massachusetts advisory opinion, *In re Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681.

The occasion of that opinion was a request by the Massachusetts Legislature for an opinion as to the constitutionality of proposed legislation which would require of automobile owners security against liability for traffic injury or fatality by a deposit of cash, a surety bond or an automobile liability insurance policy as a condition precedent to registration of an automobile to go upon the highways of Massachusetts, but on the other hand would also require companies engaged in the business of automobile liability insurance in Massachusetts to accept applicants for such insurance, and providing for determination by a State administrative board as to the reasonableness of any rejection of an applicant or of a cancellation of a policy by such companies. A determination by that board that the rejection or cancellation was unreasonable, re-

¹⁵Footnote 14, supra.

quired acceptance of the application, or reinstatement of the policy, by the company.

The Justices advised that:

“ * * * The question whether a particular risk shall be assumed by an insurer or surety is an important factor in the conduct of such business. Health, age, and susceptibility to disease form the basis of acceptance or rejection of most applicants for life insurance. Character, physical capacity, sight, hearing, financial responsibility, record of past conduct, personal habits, nature and extent of business and general reputation are among the elements of essential significance in determining whether motor vehicle liability bonding or insurance for any particular applicant shall be undertaken. To subject the determination of such a vital question by an insurer or surety to review is a great interference with freedom of contract. The right to freedom of contract is secured as a general rule by the constitutions of commonwealth and nation; but there are exceptions where legislative interference with that right is permissible. We are of opinion that the proposed bill in this aspect does not transcend legislative power. The right of the citizen to register a motor vehicle whereby he may travel upon the ways is made strictly conditional upon his depositing cash or securities or upon procuring a motor vehicle liability policy or bond. This, too, is a great interference with freedom of action. The refusal by corporations to issue such policy or sign such bond may drive one out of business or seriously impair his convenience. Where such paramount interests are at stake with sole reference to the use of

public ways provided wholly at the expense of the government, there is constitutional basis for legislative regulation to the end that no injustice may be done. Unwarranted discrimination may arise against certain applicants. Instances may arise of honest difference of opinion whether a policy or bond ought to be issued at all, or whether, after issuance, it ought to be canceled. To provide an impartial administrative tribunal to settle such controversies, although going to the verge of power, cannot in our opinion be pronounced in excess of the authority conferred by the Constitution upon the General Court. * * *." (251 Mass. 569, 147 N.E. 681, 701.)

It is true that the Justices grounded their advice as to the right of the State to require insurers to comply with such a statute upon the reserved power of the State to alter domestic corporate charters and to compel foreign corporations to do business on the same terms as domestic ones. Appellant is not a corporation, but as we demonstrate in this brief, its organization and method of doing business is not less subject to legislative requirements.¹⁶

While *In re Opinion of the Justices*, supra, was an advisory opinion, the bill which was the subject of the Justices' advice was enacted,¹⁷ and the force of the

¹⁶See "A. Identity and Nature of Appellant" at the beginning of the "Supplementation of Appellant's Statement of the Case" and footnotes 1 and 3, supra, also "IV. Appellant's Conduct of Insurance Business, and Its Methods and Form of Organization, Are Not Less Privileges Granted by the State, Nor Less Subject to Regulation, Than That of Any Other Insurer", infra.

¹⁷Mass. Gen. Laws, ch. 175, Secs. 113A-113D.

opinion, as stating the law of Massachusetts, has been shown by frequent citation of the case by the Supreme Judicial Court of that State.¹⁸

Cases before that Court have litigated the provisions of that Act, in every case sustaining it.

Liberty Mutual Ins. Co. v. Acting Comm'r. of Ins., 265 Mass. 23, 163 N.E. 648;¹⁹

Brest v. Commissioner of Insurance, 270 Mass. 7, 169 N.E. 657;

Gulesian v. Senibaldi, 289 Mass. 384, 194 N.E. 119;

Schlabach v. Commissioner, 290 Mass. 585, 195 N.E. 887;

Merchants Mut. Casualty Co. v. Justices, 291 Mass. 164, 197 N.E. 166;

Factory Mut. Liability Ins. Co. v. Justices, etc., 300 Mass. 513, 16 N.E. (2d) 38;¹⁹

American Employers' Ins. Co. v. Commissioner, etc., 298 Mass. 161, 10 N.E. (2d) 76;¹⁹

Neustadt v. Employers, etc., Corp., 303 Mass. 321, 21 N.E. (2d) 538.¹⁹

In *Factory Mutual Liability Co. v. Justices*, supra, the insurance company again raised the question of

¹⁸This opinion was cited as supporting many and diverse propositions of law in a great number of contested cases in Massachusetts commencing with *Barrows v. Farnam's Stage Lines*, 150 N.E. 206, 208, 254 Mass. 240; *Boston & A.R. Co. v. New York Cent. R. Co.*, 153 N.E. 19, 25, 256 Mass. 600; and running through to the latest we have found, *Boston and Provincetown S.S. Line v. Selectmen*, 84 N.E. (2d) 121, 122, 323 Mass. 686; *Lowell Gas Co. v. Dept. of Public Utilities*, 84 N.E. (2d) 811, 816, 329 Mass. 80; and *Collins v. Selectmen*, 91 N.E. (2d) 747, 749, Mass.

¹⁹Case cites *In re Opinion of Justices*, supra.

constitutionality of the law imposing the compulsion to insure persons who desired such insurance. In that case the applicant for insurance, in accordance with the statute, had taken the company's refusal to insure him before the proper State board, which had ordered the insurance to be issued. Under the provisions of the statute the company "appealed" the board's decision to the Superior Court and that decision was affirmed. On certiorari, before the Supreme Judicial Court, the question of constitutionality was briefly dealt with on the basis that the corporation, having been licensed in Massachusetts, took its license subject to the conditions thereof. But the Court in its reference to the conditions, cited in *In re Opinion of the Justices* on its fundamental tenet that a company accepting a motor vehicle liability insurance license could not be heard to complain of the condition involved (16 N.E. (2d) 38, 39).

"When our Legislature enacted the compulsory motor vehicle insurance law, by which all persons registering motor vehicles are required to provide security for the payment of claims for damages arising from their operation on the public ways, it foresaw the necessity for providing at the same time a procedure under which individuals could compel companies engaging in the business to insure them in the absence of sound reasons for refusal. One of the conditions accepted by a company which enters this field is that it must surrender its own final judgment as to whether or not it will issue a policy and must submit that matter to the determination of the board and of the court on appeal." (300 Mass. 513, 16 N.E. (2d) 38, 40.)

In the case now before this Court, appellee contends that the privilege of doing an automobile liability insurance business as an interinsurance exchange, with the limitations of membership liability and other privileges granted under that form of organization, and with the public stake in the lives and health of the persons and use of the highways covered by that insurance, may be conditioned upon the insurer surrendering its power of final determination as to whether it will issue insurance. This, particularly, applies in a relatively small number of cases where it is determined, under rules prescribed under legislative authority by an impartial public official with its final determination to be made by the official himself, that no sound reason exists for denying the coverage.

Texas courts, likewise, met a similar problem in connection with workmen's compensation insurance. Under the Texas Workmen's Compensation Act, the Texas Employers Insurance Association was constituted. It was made a public corporation to issue this type of insurance. (*Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556, 562; *Texas Rev. Stat.* 1925, arts. 8308, 8309.) Private companies, however, could also write the insurance. The construction that both the fund and the private companies who write Workmen's Compensation insurance must accept all applicants was set forth in the following cases:

Southern Casualty Co. v. Freeman (Tex. Civ. App.), 13 S.W. (2d) 148, 150;

Texas Employers' Ins. Association v. U. S. Torpedo Co. (Tex. Com. App.), 26 S.W. (2d) 1057;

Harris v. Traders' & Gen. Ins. Co. (Tex. Civ. App.), 82 S.W. (2d) 750;²⁰

Federal Underwriters' Each. v. Walker (Tex. Civ. App.), 134 S.W. (2d) 388.

In *Texas Employers' Ins. Association v. United States Torpedo Co.*, supra, the torpedo company had procured the issuance by the District Court of a writ of mandamus to the Insurance Association to compel the latter to issue its policy of workmen's compensation insurance to the torpedo company, covering employees of the torpedo company. The judgment of the District Court was affirmed by the Court of Civil Appeals and on a writ of error came before the Texas Commission of Appeals for recommendation to the Supreme Court. In its opinion holding that the Texas Employers' Insurance Association was bound to accept all risks coming within the terms of the workmen's compensation law, the Commission said:

"But it is said, if the Compensation Act be so construed that the Texas Employers' Insurance Association is required to accept all risks coming under its terms, the practical result would be that it would be forced to carry all extra hazardous risks, and private insurance companies would only accept less hazardous ones, while at the same time they would be permitted to charge the same rates of premiums as charged by the association, and thus a legislative advantage would be given such companies.

"We are unwilling to give assent to the assumption that a private insurance company has the

²⁰"Texas writ of error dismissed": Shepard's "Southwestern Citations", vol. 1, 1950, p. 3004.

privilege under the terms of the act to select the risks which it will cover by its policies. While it is true the Legislature has no power to require private insurance companies to issue policies of insurance to employers under the Workmen's Compensation Act, yet we have no doubt of its authority to require such companies, who may desire to avail themselves of the privilege of writing such policies, to comply with the terms of the act and give protection to all who are entitled to be covered by policies of insurance. We think a fair construction of this act requires any insurance company desiring to avail itself of the privilege of writing policies in accordance with its terms to stand on the same footing as the agency specially designed to carry out the objects and purposes of the act.

“Naturally we should assume that the Legislature did not intend by the passage of this law to so legislate as to give private insurance companies an undue or unfair advantage over the very agency it created for the purpose of carrying out the provisions of the compensation law. It will be noted that private insurance companies are required to charge and collect premiums on policies issued by them under this law in a sum not less than those charged by the association. If it had been the intention of the lawmaking body that the association was compelled to accept extra hazardous risks, and private companies were not required to do so, evidently it would not have prohibited such companies from writing the policies issued by them at a lower premium rate than that charged by the association.” (26 S.W. (2d) 1057, 1058-1059.)

The Commission therefore recommended that the decision be affirmed and the Texas Supreme Court affirmed accordingly. (26 S.W. (2d) 1057, 1059.) In our brief before the California Court, we took the view that the above discussion was dictum since what the Court did was affirm a judgment requiring issuance of the writ to the insurance association and not to a company, no company being party to the suit. However, on more mature reading, we submit that this discussion was necessary to the decision, and became Texas law.

Apparently this was the construction put on the opinion by the Texas Court of Civil Appeals in *Harris v. Traders' & General Insurance Company*, supra. In that case the complaint for damages against the insurance company alleged that Harris had been employed by a highway contractor, that the insurance company had a rule that it would request any employer, whose workmen's compensation it covered, to discharge employees who had previously drawn workmen's compensation insurance benefits, that pursuant to the rule it had procured the discharge of Harris and prayed damages against the insurance company for wrongfully procuring the discharge of Harris. From dismissal of the action on demurrer sustained, plaintiff appealed to the Court of Civil Appeals. That Court cited the opinion in the *Texas Employers' Insurance Association* case, supra, that a workmen's compensation insurer was without power to refuse an application for insurance, and said:

"Since a compensation insurance carrier is compelled by law to assume the risk upon proper request of a qualified employer, the duty is absolute, and it cannot limit that duty by promulgating any sort of a rule which, in its operation, would limit the discretion of the employer in the selection of its employees or which would disqualify a laborer seeking employment, who, but for the rule, would be qualified to accept and to retain employment. * * * (82 S.W. (2d) 750, 751.)

Consequently, the Court held that the petition stated a cause of action for procuring plaintiff's discharge by a violation of the workmen's compensation insurance law, and reversed the trial Court.

Subsequently, in *Federal Underwriter's Exchange v. Walker*, supra, the principle that compensation insurance carrier had to accept qualified risks was cited in support of the Court's reasoning. (134 S.W. (2d) 388, 393.)

It is interesting that the Texas Supreme Court in the *Texas Employers' Insurance Association* case stated that it was influenced in interpreting the Texas statute by the fact that it would not presume that the legislature would discriminate in favor of insurance companies against the State Fund. (26 S.W. (2d) 1057, 1058-1059, quoted supra.) For the Arizona Supreme Court subsequently passed on legislation which discriminated in favor of the *State Fund* and against the *insurance companies* and held the statute to be unconstitutional in *Employers' Liability Assurance*

Corporation, v. Frost, 48 Ariz. 402, 62 Pac. (2d) 320, the only case which appellant or appellee have found which held unconstitutional a statute which required insurance companies to accept applications for insurance.

This last case, however, contains a number of elements which make it a very weak support for any theory under which the California legislation here under attack may be held invalid. One of these is the fact that the Court obviously failed to note the status of the principle involved as reflected in the decisions of Courts of other States. The other is the element of unfair discrimination between insurers, first mentioned by the Texas Supreme Court, *supra*.

In this *Frost* case the insurance company sought to have annulled a workmen's compensation award arising out of the death of a workman. The employer had filed his written application with and paid the initial premium to the soliciting agent for the company, in response to a letter from the general agent of the company stating that upon receipt thereof "we shall be glad to give this risk our further consideration".

(48 Ariz. 402, 62 Pac. (2d) 320, 321.) On the same day the soliciting agent mailed the premium and application to the general agent and on that day, also, the workman was killed. The Arizona statute provided that an employer must secure compensation either by insurance in the Arizona State Fund or by securing from the Commission consent to self-insure, or:

"By insuring * * * with a corporation * * * authorized to transact * * * workmen's compensa-

tion insurance in the state * * *. *Such corporation * * * shall write and carry all risks or insurance for which application may be made to it which are not prohibited by law, and shall carry all risks to the conclusion of the policy period unless cancellation is agreed to by the commission and the employer * * *.*" (48 Ariz. 402, 62 Pac. (2d) 320, 322.)

Apparently on the theory that the insurer had no option to refuse the application and that therefore the coverage was effective when the application was filed with and the premium paid the soliciting agent, the Industrial Commission made an award of compensation to the deceased workman's parents. The Supreme Court of Arizona annulled the award on the ground that the statute requiring it to accept the application violated the "freedom of contract clause of the Fourteenth Amendment."

Careful examination of the grounds given by the Court in its opinion, however, show that it is of slight value as authority here.

For instance, the Court prefaces its discussion of the authorities with the statement that:

"The courts have gone far in upholding the right of the state to regulate and control insurance business within its boundaries, but we have found no case where the facts, as here, call for a decision upon the power of the Legislature to make it mandatory upon an insurance company qualifying under its laws to carry a certain kind of insurance to insure all risks of that kind for which application may be made to it which are not

prohibited by law.''' (48 Ariz. 402, 62 Pac. (2d) 320, 324.)

This *Frost* opinion is dated November 23, 1936. Of the Texas and Massachusetts cases above cited, the *Texas Employers' Insurance Association* case had been decided in 1930, and the *Harris* case had been decided on May 10, 1935, *In re Opinion of the Justices* had issued in 1925, the *Liberty Mutual Insurance Company* case in 1928, and the *Brest* case in 1930, the latter two both citing *opinion of the Justices* as law. While appellant has attempted to distinguish these cases (Br. of App., pp. 63-65), it is incredible that the Arizona Court would have used the language above quoted if it had known of their existence.

Furthermore, the Arizona Court makes a case for application of the due process clause in pointing out that the competitive Arizona State Fund is not placed under the same duty as the insurance companies:

"If the risk asked to be written is, for any reason, such as the past bad experience of the employer, the dangerous place and kind of employment, the careless and reckless habits and indifference of the employer and employees, one in which the insurer is likely to be called upon to pay many and large compensations, *we do not think that even the Industrial Commission would be compelled to assume and write the risk.* One of its duties is to protect the state compensation fund. The statute gives the commission full authority over this fund (section 1410), and provides, in section 1411, that: 'The commission may, in its name, make contracts of insurance to in-

clude and cover the entire underlying liability of employers insured in the state compensation fund.'

"This language is permissive and not mandatory. The provisions of section 1422, however, leave to insurance companies no alternative; they must write all applications. There is no reason, real or apparent, for this provision unless it be that it was put into the law as a deterrent to private insurance companies to enter the field of compensation insurance in competition with the state compensation fund. If that was the motive, the law should have prohibited insurance companies from selling compensation insurance in Arizona and not undertaken to compel them to insure all applications regardless of the hazards." (48 Ariz. 402, 62 Pac. (2d) 320, 323; emphasis supplied.)

In respect to the Arizona *Frost* case, then, we suggest the correctness of the California Court's remark referring to this last element, "This ground of the decision is undoubtedly sound; the freedom of contract argument is not."

However, it should be noted that the *Frost* case and the Texas cases dealt with laws requiring that the insurer serve all qualified applicants, in effect an obligation somewhat analogous to that imposed upon a public utility. The Massachusetts law is somewhat milder, with its provision for determination of the reasonableness of requiring the insurer to issue or continue to carry the insurance (cf. *In re Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681, at p. 701;

Factory Mutual Liability Ins. Co. v. Justices, 300 Mass. 513, 16 N.E. (2d) 38).

But all the laws discussed in the cases from Massachusetts, Texas, and Arizona had the requirement of service to all applicants at rates prescribed by State authority. As we shall point out hereafter in this brief this obligation is much more drastic than that imposed by the California statute and plan.

C. DECISIONS OF THIS COURT IN MANY FIELDS OF THE POLICE POWER SUSTAIN THE REASONABLENESS OF LEGISLATION OF THE GENERAL NATURE OF THAT HERE UNDER ATTACK.

1. **The constitutional principles pronounced by this Court relating to governmental regulation for the public welfare, and the relevance thereto of the facts here involved.**

Any discussion of police power decisions of this Court necessarily contemplates that, at most, these decisions are of but suggestive value, that they but illustrate situations in which this Court has pricked out the line which separates the permissible exercise of State power from the situations where that exercise violates Constitutional restrictions.

“The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation, valid for one sort of business,

or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the *reasonableness of each regulation depends upon the relevant facts.*"

* * * * *

"The Court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community."²¹

And this Court has many times indicated that

"* * * a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation."²²

So the question here is as to the relevant facts which can be set forth in justification of the legislation here involved. This is the picture:

1. A substantial portion of the personal injuries and deaths in California arise out of motor vehicle accidents.²³

²¹*Nebbia v. New York*, 291 U.S. 502, 525, emphasis supplied.

²²*Abie State Bank v. Bryan*, 282 U.S. 765, 772.

²³In 1946, the year before the enactment of the legislation here attacked, the United States as a whole had a death rate of ten per thousand. California's was 9.9 per thousand. ("Statistical Abstract of the United States, 1948", pub. U.S. Dept. of Commerce, Bureau of the Census, p. 72.) But with respect to motor vehicle fatalities, the country-wide rate was 23.9 per 100,000, while California's rate was 39.5 per 100,000. On the other hand, the country-wide death rate per hundred thousand for all accidents other than motor vehicle accidents was 46.2; whereas, California's rate was 43.2. (Ibid., p. 76.)

In 1947, the situation was substantially the same. The nation-wide death rate was 10.1 per thousand. California's rate was

2. Since 1929, legislation has increasingly penalized involvement in highway accidents by uninsured drivers, these penalties being apart from and in addition to the civil liabilities involved.²⁴

3. The consequences have been:

(a) A considerable increase in the volume of automobile liability insurance written in California.²⁵

still 9.9. (Statistical Abstract of the United States, 1949", pub. U.S. Dept. of Commerce, Bureau of the Census, p. 71.) And the motor vehicle accident proportions are not significantly changed. The nationwide death rate for motor vehicle accident deaths was 22.8 per 100,000 while California's was 35.2. The nationwide death rate for accidents other than motor vehicle was 46.6 per 100,000, while California's rate was 41.7. (Ibid., p. 74.)

It appears from the above figures that on a nation-wide basis the motor vehicle accident death rate was about a third of the total rate of deaths from all accidents, whereas the California motor vehicle death rate was far nearer half than a third of the death-rate from all accidents. Yet California's overall death rate was lower than the nationwide rate. The social interest of the people of California in the protection of highway accident victims and their dependents, and the economic burden on the public purse when adequate compensation is not available to the victim or his dependents, are obvious.

²⁴See statutes discussed under "B. the statutes involved, and the history and background thereof", supra, and the statutes themselves as printed in Appendix A hereto.

²⁵Sections 420, et seq., Vehicle Code, providing for summary suspension, without hearing, of the licenses of drivers involved in an accident unless they have insurance in force or post bond, or money with the Department of Motor Vehicles to cover a possible judgment against them, were enacted in 1947, effective in September of that year. The volume of premium on automobile liability insurance written in California increased from \$127,281,410.69 written in 1947 to \$161,273,534.64 written in 1948, an increase in 1948 of 28+% over that of 1947. (81st Ann. Rep. of the Ins. Commr. of California, p. XII.) This was also true of appellant, which wrote \$2,305,032.12 of such premium in 1947 (80th Ann. Rep. of the Ins. Commr. of California, p. 281) and \$2,985,796.47 of such premium in 1948. (81st Ann. Rep. Ins. Commr. of California, p. 282.) On the other hand, the total premium on all insurance written in the State increased from \$993,029,469.42 written in 1947 to \$1,121,830,562.67 in 1948, which is an increase of slightly under 13%, including the automobile liability. (81st Ann. Rep. of the Ins. Commr. of California, p. XV.)

(b) The creation of a group of persons who were equitably entitled, in the belief of the legislature, to insurance protection from the consequences of these statutes, but were unable to procure this insurance in the normal operation of the insurance market. (R. 174). The statute here involved is, of course, limited in effect to these people. (Cal. Ins. Code sec. 11620, and sec. 2400 R. 10).

4. For some years prior to 1947, all the insurance companies doing automobile liability insurance business in California had voluntarily maintained a plan whereby persons required to obtain automobile liability insurance in order to drive, but unable to procure it upon application to at least three insurance companies (R. 156), could apply to the office maintained by the plan and, if there found to be "in good faith entitled to" the insurance, were assigned to and issued policies by insurance companies, these risks being "assigned" among the companies in proportion to the premium on that type of insurance written in California by the particular insurer during the previous calendar year. (R. 152-166). Appellant was a member of the plan, but withdrew at the beginning of 1947. (R. 77, 106). The method of assigned risk plans was a normal and ordinary technique of the business.

5. There followed, in 1947, the enactment of the legislation and plan here attacked. They require the same sharing of risks by the companies on substan-

tially the same basis as the voluntary plan, except that they extend to all members of the class of those "in good faith entitled" to the insurance, instead of only those who, because of involvement in prior accident, or engagement in the commercial trucking business, were required by law to procure the insurance as a condition precedent to procuring or reinstating their driver's license. It contains provisions defining unworthy applicants and excluding them (R. 14-19) sets forth a procedure for application by and assignment of applicants (R. 21), prescribes rates and premiums, commissions, etc. (R. 25). It provides for an appeal by applicant, insured, or insurer, first to the governing committee of the plan, then to the State Insurance Commissioner (R. 30-31). It is significant that appellant has nowhere claimed that a lack of "procedural" due process exists in the plan, its attack is confined to the question of power to impose the obligation to subscribe as a condition of receiving a license to write this type of insurance.

These facts, it is respectfully urged, show the statute and plan to be reasonable and appropriate to the obvious and legitimate social ends to which it tends, indemnity for innocent victims of highway accidents and insurance protection to the automobile drivers and owners from drastic license penalties and loss. Insurance is a means of providing the indemnity and protection, the insurance companies are in the business of providing it, they unquestionably benefit by reason of increased business—there is no reason to believe that they will suffer actual loss by furnish-

ing the required insurance,²⁶ their failure, in the particular class of cases involved, to furnish the insurance, is impliedly found by the legislature to be unreasonable by virtue of the enactment of the legislation, and the legislation provides for the settlement by an impartial State official of disputes thereunder.

Even if loss to some of the companies should occur by reason of the risks accepted under the legislation, there is no evidence in the record to show that the loss will be of a confiscatory nature.²⁷

2. Illustrative cases in this Court.

Of course, the case that comes nearest to a decision of this Court on legislation which would require an insurance company to accept applications for insurance as a condition of doing business in a State is *National Union Fire Insurance Company v. Wanberg*, 260 U. S. 71. The case is cited by appellant in support of its contention that the California statute is unconstitutional because it imposes upon insurance companies the obligation to make contracts. Appellant quotes from the Arizona Supreme Court's decision in *Employers' Liability Assurance Corporation v. Frost*, *supra*, to the effect that if the statute involved in the *Wanberg* case had required the insurance company to accept the business, this Court would

²⁶An attempt at the departmental hearing to show a high loss ratio under the voluntary plan was rejected on ground of the difference of eligibility between the two plans. This difference has been commented on in detail in our supplementation of appellant's statement of the facts under the heading: "Character of the risks assigned under the law", *supra*, this brief and cf. Appendix B, *infra*. See also footnote 12, *supra*, this brief.

²⁷See pp. 62-65, *infra*.

have held "that the limits of regulation had been transcended and the freedom of contract guaranteed by the Federal Constitution violated." (Br. of App., pp. 32-33).

But the *Wanberg* case sustained an exercise of State power. The North Dakota statute there involved provided, that unless an insurance company writing hail insurance in the State rejected an application for such insurance within twenty-four hours of the time it was received, it was on the risk as though it had accepted the application.

This Court sustained the constitutionality of the statute in the face of contentions that it violated the due process clause by forcing a contract on the insurance company and, because of danger of over-committing the company in a given area, exposing the company to undue loss.

Appellant argues that the case impliedly supports its contention by quoting two statements by the Court: first, that the North Dakota legislation "approaches closely the limit of legislative power, but not that it transcends it". (260 U. S. 71, 76), and, second, that this North Dakota legislation "does not force a contract on the company. It need not accept an application at all or it can make its arrangements to reject one within twenty-four hours". (260 U. S. 71, 76).

From these two statements appellant constructs a magnificent *tour de force*: "Since the North Dakota statute went to the verge²⁸ of the state's power, the

²⁸By definition, "verge" may be an area as well as an edge or boundary. (Webster's International Dictionary, 2d ed., G. C. Merriam, 1941, pp. 2831-2832, cf. other meanings given therein.)

present (California) statute passes the line." (Br. of App., p. 32).

One finds a certain difficulty in accepting the reasoning which holds that because A is close to a limit B must be over the limit, and which implies, from a statement that an element is missing from a case, a principle that the missing element would, if present, violate the Fourteenth Amendment.

—However, one feature of the problem presented the Court in the *Wanberg* case *could* have justified a dictum that an absolute requirement of acceptance on hail insurance contracts would have invalidated the statute. This was the presence of the danger of over-committal in a given area:

"* * * It is urged that no company, to be safe and to make the business reasonably profitable, can afford to place more than a certain number of risks within a particular section or township, and that is what is called 'mapping' must be done to prevent too many risks in one locality and to distribute them so that the company may not suffer too heavily from the same storm." (260 U. S. 71, 76).

It should be noted that no such danger exists in the case of the California statute here involved, with the latter's provisions for "equitable apportionment" of the assigned risks among the insurers (Cal. Ins. Code sec. 11620, Br. of App., Appendix 1) its liability policy limits (Cal. Ins. Code sec. 11622; sec. 2406, R. 11) and the provision of the plan that the manager of the plan is to make the assignments "with due regard to exclusions under reinsurance agreements,

treaties or contracts filed with him in writing." (Sec. 2445, R. 21.)

The *Wanberg* case, in its willingness to sustain the legislation there involved on the basis of the public welfare policy behind the statute, supports appellee's contentions rather than appellant's. This Court there says:

"* * * In that country," (North Dakota) "where a farmer's whole crop, the work and product of a year, may be wiped out in a few minutes, and where the recurrence of such manifestations of nature is not infrequent, and no care can provide against their destructive character, *it is of much public moment that agencies like insurance companies to distribute the loss over the entire community should be regulated so as to be effective for the purpose.*" (260 U. S. 71, 74; Emph. Sup.)

Surely cogent and analogous reasoning of the same sort sustains the statute here under attack.

We have already mentioned the many decisions of this Court sustaining State legislation drastically restricting the contract rights of insurance companies.²⁹

In *Osborn v. Ozlin*, 310 U. S. 53, this Court, after citing the many instances of such restrictions of rights of insurance companies by various regulatory laws in the interest of the public welfare said:

"* * * In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses,

²⁹See cases cited in footnote 13, supra.

flour mills, and other business ventures, *Green v. Frazier*, 253 U. S. 233, or might take 'the whole business of banking under its control', *Noble State Bank v. Haskell*, 219 U. S. 104, 113. If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards. *La Tourette v. McMaster*, 248 U. S. 465. All these are questions of policy not for us to judge. * * * The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control." (310 U. S. 53, 66.)

And this Court thereupon held constitutional a Virginia statute which required that insurance upon Virginia risks must be written through agents resident in and licensed by Virginia who should receive the entire commission on the business, except that not over fifty per cent of such commission might be paid non-resident brokers also licensed by Virginia.

In that case it was not mentioned that this Court has sustained State legislation whereby a State actually did take the whole of one part of the insurance business under its control. We refer to workmen's compensation insurance, and to legislation of the State of Washington which as part of its workmen's compensation system effectually excluded insurance companies from the business by requiring employers to insure against the liability for workmen's compensation in a monopolistic state fund, through a system whereby the premium payments

were made in effect an occupational tax. In *Mountain Timber Co. v. Washington*, 243 U. S. 219, this Court sustained that legislation. This was not a restriction upon the insurance company's right to contract—it was in one leading field of casualty insurance³⁰ an *abolition* of the right.

By analogy—of course always perilous in police power cases—California, if its legislature determined it to be in the public interest, could eliminate automobile liability insurance and instead require every driver or owner in the State, to contribute to a State fund to reimburse losses of victims of traffic accident. Is it more destructive of contractual rights to permit the business to be done by insurance companies on condition that such companies subscribe to a system for equitable apportionment of drivers, other than the uninsurable drivers, who cannot obtain the insurance by ordinary methods?

Another analogous line of authority may be derived from this Court's decisions in the bank guaranty fund cases, of which the leading case was *Noble State Bank v. Haskell*, 219 U.S. 104,³¹ cited in *Osborn*

³⁰The last published report of the California Insurance Commissioner, covering the year 1949, shows that out of a total of \$1,144,024,547.03 of all insurance premium written in the State of California in that year, Workmen's Compensation premiums amounted to \$27,806,815.84 or slightly over 8½ per cent of the total. (82nd Ann. Rep. of the Ins. Commr. of California, p. 398.) A relative picture may be presented by the fact that in the same year the California fire insurance premium amounted to \$115,998,075.02 and the disability (accident and health) insurance premium to \$88,103,413.04. (Ibid.)

³¹Cf., also *Shallenberger v. First State Bank*, 219 U.S. 114; *Assaria State Bank v. Dolley*, 219 U.S. 121; *Abilene Natl. Bank v. Dolley*, 228 U.S. 1; *Abie State Bank v. Bryan*, 282 U.S. 765.

v. Ozlin, supra. In that case the Oklahoma legislation provided for the creation and maintenance of a State guaranty fund to secure deposits in banks licensed by the State. It was to be established and maintained by assessments on State banks, measured by their average daily deposit balances. When the case came before this Court, the legislation was sustained on the basis of the importance of securing the safety of checks as currency in the commerce of the State, this Court saying:

“* * * We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. *On the contrary, we are of the opinion that it may go on from regulation to prohibition except upon such condition as it may prescribe.* In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described co-operation are necessary safeguards, this court certainly cannot say it is wrong.” (219 U. S. 104, 113; Emph. Supp.)

Earlier in the opinion the Court had said:

“It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arrive. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355.” (219 U. S. 104, 112.)

Another group of cases which form an analogy to the situation here present were the grain elevator cases of *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; and *Brass v. Stoeser*, 153 U. S. 401. The first two cases sustained the constitutionality of legislation of the States of Illinois and New York, imposing the status of a business "affected with a public interest" upon the business of storing and elevating grain, by regulating charges to be made for services rendered by that business. Those cases might be distinguished by reason of the fact that there existed in those States a practical monopoly by reason of the elevator owners' control of facilities and the desperate necessity, to business and agriculture, of the proper and reasonable use of the facilities. More analogous to the present situation, however, is the third case, which arose out of the prairies of North Dakota.

In that case, *Brass v. Stoeser*, 153 U. S. 391, state legislation defined persons operating grain elevators as "public warehousemen" and regulated their fees and charges. Brass, such an operator, refused to receive certain grain at the storage charges provided by the law, alleging they were too low, and a writ of mandate issued out of the State Court to require him to do so. The case came to this Court on writ of error to the North Dakota Court and this Court affirmed, holding that the power of the State to regulate the grain elevator business did not depend upon the fact of a practical monopoly by the elevator owners. In short, this Court held constitutional a law under which the elevator operator was required

to *make contracts*—of bailment of grain—at fees and charges and under conditions—maintenance in force of insurance by and at the expense of the operator covering the grain for the benefit of its owner—prescribed by the legislation. •

Over many years, such cases as the *Munn*, *Budd*, and *Brass* cases, were referred to as cases involving business “affected with a public interest”, a class of businesses sometimes described as “quasi-public” utilities, i.e., businesses which were not public utilities in the sense in which common carriers, water, gas, and power distributors, and similar organizations were, but which were subject to similar obligations of public service and similar regulation, adapted to the particular businesses, by virtue of the State’s police power. The operators of such businesses were said to have “dedicated” the business to public service in analogy to the dedication of the property and business of a common carrier or public utility to a particular service to the public by acceptance of a franchise to operate such a service in a given territory or over a specified route.

In *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, fire insurance was held by this Court to be “affected with a public interest”, so as to justify regulation of the rates charged therefor. The occasion of the case was a Kansas statute vesting in the Superintendent of Insurance of that State the power and duty of prescribing fire insurance rates and requiring fire insurance companies to adhere to the rates so prescribed. Plaintiff insurance company

sued to restrain enforcement of the statute in the Circuit Court of the United States for the District of Kansas and, from a dismissal following general demurrer sustained, it came to this Court on appeal.

It is significant that the arguments and philosophy urged by the plaintiff company were substantially the same as many of those urged in this case: interference with a private business which received no privilege from the State;³² "taking of a private property for a public use;"³² that the Act could not be justified as an exercise of police power "or of the power of the State to admit foreign corporations within its borders upon such terms as it may prescribe";³² and "that the business of insurance is a natural right receiving no privilege from the State";³² (233 U. S. 389, 405). But this Court said:

"* * * It is said, the State has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the 'test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied;' * * * Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. * * * The distinction, we think, has no basis in principle (*Noble State Bank v. Haskell*, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated." (233 U. S. 389, 407.)

³²Cf. Br. of App., pp. 54, 55, 59, 66.

The Court then cited *Munn v. Illinois*, *Budd v. New York*, and *Brass v. Stoeser*, *supra*, as illustrating the fact that "a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation." (233 U. S. 389, 411.)

It thus appears that, over thirty-seven years ago, the argument that regulation of a business in the public interest must be founded on a "dedication" to public service by the owner of that business, was emphatically rejected by this Court.

However, the "dedication" theory as a measure of the right of the State to impose police regulation on the ground of public interest was, we think, finally quashed in *Nebbia v. New York*, 291 U. S. 502, which upheld the constitutionality of the New York legislation regulating distribution of milk, particularly authorizing an administrative agency to prescribe the sale prices of milk. In course of the opinion, this Court said:

"* * * The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, * * *. This view was negatived many years ago. *Munn v. Illinois*, 94 U. S. 113. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a

misconception. Munn and Scott held no franchise from the state. They owned the property upon which their elevator was situated and conducted their business as private citizens. No doubt they felt at liberty to deal with whom they pleased and on such terms as they might deem just to themselves." (291 U. S. 502, 532.)

"The true interpretation of the court's language is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously Munn and Scott had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue," (291 U. S. 502, 533-534.)

3. This Court does not rest its determination as to the constitutionality of state police power legislation upon any distinction between statutes which compel the subject of the regulation to make a contract and those which merely prohibit an act or practice.

Much is said by appellant concerning interference with "freedom of contract" (Br. of App., pp. 18-19, 24-27, 32-42).

"* * * What is this freedom (of contract)? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution

does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." (*West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 391.)

As we have stated above at the beginning of our discussion of the police power cases, this Court has always insisted that the basis for determination in each such case is the public policy concerned in *relation to the relevant facts*. In cases cited by appellant this Court has, in reply to a contention that the legislation under attack substituted compulsion for free contract, noted that the point was not well taken because the legislation did not require anyone to make a contract,³³ but it has not permitted the fact that the legislation compelled the making of contracts to constitute a constitutional distinction between permissible and non-permissible regulation.

Indeed, one of the early grain elevator cases affirmed a judgment granting a writ of mandate to compel an elevator operator to make: (1) contracts of bailment of grain with whoever offered the grain, without discrimination, and (2) insurance contracts

³³Br. of App., pp. 32, 37-42.

with some insurance company for the benefit of the owner of the grain. (*Brass v. Stoesser*, supra.)

In *Phelps-Dodge Corporation v. Labor Board*, 313 U.S. 177, also cited by appellant,³⁴ this Court affirmed an order of the National Labor Relations Board which, to use the vigorous language of the dissenting opinion, ordered the employer "to hire applicants for work who have never been in his employ". (313 U. S. 197, 208.) But even the dissent raised no constitutional question, merely contended that such a construction of the statute granting the Board's powers was beyond the Congressional intent. (313 U. S. 197, 208-212.)

And, of course, as we have mentioned above, in *Mountain Timber Co. v. Washington*, 243 U. S. 219, the employer was totally deprived of his right to secure the payment of compensation liabilities by free contract with an insurance or bonding company and compelled, in lieu thereof, to contribute to a State fund.

It is interesting to note that, in accordance with the traditional reluctance of the Courts to go into issues not directly involved by reason of the facts in these police power cases,³⁵ when this Court, in *New York Central Railroad Co. v. White*, 243 U. S. 188 dealt with the compensation law of New York, which had a competitive State fund and allowed the employer to insure in that fund, in a qualified insurance company, or to self-insure, it refused to

³⁴Br. of App., p. 41.

³⁵*Roig v. People of Puerto Rico*, 147 Fed. (2d) 87, 89, 90.

go into the question of the constitutionality of legislation which would require an employer to insure according to the first or second alternative, saying:

"There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the State to impose."
(*New York Central R. R. v. White*, 243 U. S. 188, 209.)

Only a few pages later in the same volume of reports, there is likewise a refusal to pass on the Iowa law which required the employer to insure in insurance companies on the ground that under the Iowa law, acceptance of the provisions of the compensation law by employers was optional with the employers. (*Hawkins v. Bleakly*, 243 U. S. 210, 219.)

Yet, in the next case in the same volume of the reports, *Mountain Timber Co. v. Washington*, 243 U. S. 219, where the question became a material issue because of compulsion both to accept the law and to insure in a State fund, this Court squarely sustained the constitutionality of the law.

As a matter of fact, the expressions in certain of the cases cited by appellant in its effort to distinguish between "compulsion to serve or to contract" and "regulation,"³⁶ are themselves applicable to the California legislation and plan here involved, since the writer in those cases was most obviously referring to *legal* compulsion as opposed to *economic* compulsion. An example is the quotation of one sentence

³⁶Br. of App., p. 33.

from Justice Holmes' dissent in *Adkins v. Children's Hospital*, 261 U.S. 525, 570:³⁷

"This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement
* * *"

But the next sentence of the opinion is equally significant:

"It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, *or unless the employer's business can sustain the burden.*" (261 U. S. 525, 570; Emph. Sup.)

In short, the writer was saying that the employer need not hire women at the prescribed minimum wage—he had the choice of going out of business if his business could not afford to pay the money.

But indeed, this is the choice in the case of many of the laws interfering with freedom of contract. In *Osborn v. Ozlin*, supra, the insurance company had the choice of paying the commission on Virginia risks to resident Virginia agents—i.e., *was compelled to make contracts* of agency with persons licensed as agents in Virginia—or stop writing Virginia risks. In *Hardware Co. v. Glidden*, 284 U. S. 151, the insurance company had the choice of making fire insurance contracts in the form prescribed by the particular State or of going out of fire insurance business in that State.

³⁷Br. of App., p. 42.

In the current matter, the appellant has the choice of writing automobile liability insurance in California on condition that it accept its equitable proportion of risks which the legislature has determined are in good faith entitled to insurance, or of refraining from doing that business in California. How this choice differs, in its essential qualities from a constitutional point of view, from those above specified has not been made apparent. How is this any more "the highwayman's order, 'Your money or your life'," ³⁸ than the choices presented in the above cases?

II. THE STATUTE DOES NOT IMPOSE UPON APPELLANT, OR UPON ANY OTHER INSURER, ANY OBLIGATION TO SERVE THE PUBLIC GENERALLY.

Throughout this case and in all the tribunals through which this case has passed, appellant has insisted that the legislation here attacked has the effect of imposing upon it the obligation of a public utility to render its service to the general public and not to refuse to serve anyone tendering the price. This insistence alone justifies our taking up in argument that which is patent from the statement of facts, *supra*, the statute (Br. of App., Appendix I) and the plan (R. 10-32); that the main characteristic of this assigned risk plan method of securing coverage of all risks in good faith entitled to insurance is that it secures coverage *without* imposing the public utility type of obligation to serve all who apply, and permits adjust-

³⁸Br. of App., p. 55.

ment of premium to secure adequate rates for risks which, in the eyes of underwriters at least, may be regarded as impaired but by no means uninsurable. Because a clear outline, without argument, of the actual working of the plan will be sufficient to show this, we here set it forth:

1. The plan is administered by a governing committee of five persons, each selected by the group of insurers, classified according to type of organization, included in the plan. The committee selects the manager of the plan and is responsible for its administration. The manager is the administrative executive of the committee and is subject to its direction. (Secs. 2420-2422, R. 12-14.)

2. There are extensive exclusionary rules directed to "screening" out the uninsurable, as distinguished from the merely impaired, risk. These exclusions are based on both physical hazards (mechanical and human, cf. secs. 2431.55 and 2437, 2431.4, 2431.85) and "moral hazards". (Secs. 2430-2438, R. 14-19.)³⁹

3. Anyone unable to procure insurance by ordinary methods may apply to the plan for his insurance.⁴⁰ Form of application is prescribed in some detail. A five dollar fee is charged for taking the application, and is credited on the premium if the insurance is placed. The manager examines the application to de-

³⁹See the California Court's description of these exclusionary provisions. (R. 179-180.)

⁴⁰The insurance, of course, has limits of liability: \$5,000 for injury to any one person; \$1,000 for injury to any number of persons; \$5,000 for damage to property (Sec. 2406, R. 11) as provided by Section 11622, Cal. Ins. Code.

termine eligibility, and if he so determines, forwards the application and fee to the insurer to whom he assigns the risk. (Secs. 2440-2444.5, R. 19-20.)

4. There are detailed provisions prescribing the method of determining assignments. The basic principle (Sec. 2445) is that each insurer's share of assignments shall be in the same proportion as its proportion of the California automobile liability insurance premiums. (Secs. 2445-2449.15, R. 21-23.)

5. Within twenty days after receipt of notice of assignment, the assignee insurer must accept or reject. If it accepts it must notify the applicant that upon receipt of the stated balance of the premium within 15 days—or a longer period if the insurer desires—it will issue the policy on the day following such actual receipt. If there be rejection, the manager and the applicant must be informed and the manager must be furnished the reasons why the insurer believes the applicant not to be "in good faith entitled, under the Plan, to insurance. The manager may within 5 days thereafter overrule the insurer, in which case the insurer must accept the risk."⁴¹ (Secs. 2450-2453, R. 23-24.)

6. The accepting insurer normally makes its premium charge on the same basis as though the applicant were not under the plan, but, under certain circumstances may add certain surcharges. (Sec. 2460, R. 25, but see modification: ftn. 12 and Appendix B.)

⁴¹Subject of course to the right of appeal given by Section 2495. (R. 30-31.)

7. Special provisions are included for adjustment upward of these premiums so computed, under unusual conditions and subject to the approval of the committee. (Sec. 2461, R. 25.)

8. There are also special provisions relating to agents' commissions, which are limited to a range from 5 to 10% of premium according to risk with a $2\frac{1}{2}\%$ commission to certain agents for field supervision rendered (Secs. 2462-2463, R. 25.)⁴²

9. With prior written approval of the manager, an insurer may cancel an assigned risk for subsequently developed reasons, generally, for which rejection in the first place would have been in order. (Secs. 2470-2472, R. 26.)

10. At close of policy period insured and insurer each have right to request change of assignment and provision for both normal renewal, renewal as an assignment, or re-examination of the risk by the manager is made. There are also somewhat elaborate provisions respecting the record of the insured during the assignment and its influence upon new assignment, etc. (Secs. 2480-2485, R. 26-29.)

11. The costs of administering the plan are assessed annually upon the subscribing insurers, in proportion to the California automobile liability insurance premium writings during the previous calendar year. (Secs. 2490-2491, R. 29.)

⁴²This agent's or broker's commission is much lower than on normally placed business, which averaged, nationwide, in a range of $17\frac{1}{2}\%$ up, as given in Kulp, "Casualty Insurance", Rev. Ed., 1942, p. 597.

12. There are provisions prescribing the records and statistics to be kept, for appeals, for examination by the Commissioner and miscellaneous matters. Of particular interest should be Section 2495, which permits any "applicant, insured, or insurer" to appeal from the manager to the governing committee and from the governing committee to the Commissioner. Decisions of the Committee and of the Commissioner on appeals must be based on hearing the parties. (Secs. 2492-2498, R. 29-32.)

The foregoing outline should demonstrate that there is nothing of the nature of a public utility service obligation imposed on any subscribing insurer under the plan or statute. No member of the public can demand insurance under the plan from any insurer, but must accept the insurer to which he is assigned. The burden, if it be called that, of rendition of the services is carefully, though approximately, adjusted to the extent of the insurer's business of the type of insurance involved. Were it not for the fact that in all probability and in the long run, by reason of the adjustment of premium provided under the plan this type of business will pay its own way or at least not cause overall out-of-pocket loss to the insurers, the obligation to render the service under the statute and plan could be more nearly likened to a tax than a general public service obligation. Certainly, it more nearly resembles the type of obligation portrayed in *Mountain Timber Co. v. Washington* as a tax on the

employer, or in *Noble State Bank v. Haskell* as a condition to a license to act as a bank, than it does the obligation of a common carrier to transport all who request service on its route and tender the charge, or of a water or power distributor to serve all in its franchise territory.

III. NO QUESTION OF THE TAKING OF PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION IS PRESENTED HERE.

Appellant's brief (Br. of App. pp. 66-70) appears to be contending that in some way—not clearly specified by it—the legislation under its attack here constitutes a taking of its property without compensation.

But no evidence was *offered* or *introduced* to sustain such a contention.

At the hearing in the California Insurance Department, appellant offered in evidence a copy of the extra-statutory voluntary plan of assigning risks operated by the insurance companies with Departmental permission from 1942 to 1948. Objection on the usual grounds of incompetency, irrelevancy, and immateriality were sustained (R. 87), but, as the California rule in such cases requires the document to be preserved as part of the record,⁴³ it is here available. (R. 152-166.)

Appellant also, after testimony as to the loss record under the voluntary plan was likewise similarly rejected because of remoteness, dissimilarity between

⁴³Cal. Government Code, Section 11523.

the voluntary and compulsory plans (R. 86), made offers to prove (1) that the loss ratio for automobile liability under the voluntary plan during its life was .799 (R. 86, 101); (2) that the character of risks under that plan averaged a premium over 140 per cent of the normal premium for similar insurance (R. 92); (3) that the bodily injury loss ratio of appellant during that period was only .502 (R. 98) and (4) that, during that period, appellant wrote no risks of a character that took in excess of 100 per cent of the normal premium. (R. 100.)

There would seem to be no question that the hearing officer properly rejected the evidence offered and that the Superior Court properly so found. A comparison of the eligibility provisions of the two plans shows that, under the voluntary plan, insurance was restricted to those compelled to procure it in order to drive (Sec. 1, R. 152-153), whereas, the compulsory plan was open to *all* who were in good faith entitled to insurance, but could not procure it by ordinary methods. (Sec. 2400, R. 10.) It can be easily seen that the difference between the groups of applicants involved is great. While the latter may include the former, the indications that the group members not in the former will greatly improve the loss record of the group as a whole are overwhelming, particularly in view of testimony brought out by appellant that the compulsory plan will have four times the number of applicants. (R. 92.) Since the voluntary plan presumably included all those required by law to get the insurance in order to secure their licenses, it follows that three-fourths of the risks under the compulsory

plan will be of a better class of driver than under the voluntary plan and that the overall experience of that voluntary plan will not be indicative of compulsory plan experience.⁴¹

However, we face the further fact that, even if all the facts offered to be proved by appellant relative to loss ratios had been proved, and even if the old and new plans had been identical, no case of confiscation under the constitution would have been made because:

(1) The record is barren of evidence or offer of proof as to the cost of doing business which would have thrown light on appellant's offered proof by showing whether or not actual loss to the insurers would occur from the bodily injury loss ratios offered to be proved. For, if the cost of doing business (including reasonable compensation) did not exceed the difference between the loss ratios offered to be proved and the premium received, where would there be confiscation?

(2) The offered proof could have shown only that the average aggregate loss ratio for the business done under the voluntary plan as a whole was much greater than appellant's average loss ratio. But as departmental counsel at the departmental hearing forcibly pointed out (R. 82), proof of aggregate experience of all insurers engaged in the business in the State is no basis for a showing of confiscation in the constitutional sense as to one of them. *Aetna Insurance Co. v. Hyde*, 275 U.S. 440.

⁴¹See our "Supplementation of Appellant's Statement of the Case", supra, this brief, under the heading: "Character of the Risks Assigned Under the Law".

In that last case the fire insurance companies doing business in Missouri sued as a group to set aside state-prescribed rates, claiming they were confiscatory and submitting proof of aggregate premiums received and losses by the companies writing the business. In dismissing the application for the writ of certiorari to the Missouri Supreme Court which had sustained the rates, this Court said:

“ * * * It has never been and cannot be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business. * * * In order to invoke the constitutional protection, the facts relied on to restrain the enforcement of rates prescribed under the sanction of state law must be specifically set forth, and from them it must clearly appear that the rates would necessarily deny the plaintiff just compensation and deprive it of its property without due process of law.”
(275 U.S. 440, 447.)

It is respectfully submitted, therefore that no issue of confiscation arises in this case.

IV. APPELLANT'S CONDUCT OF THE INSURANCE BUSINESS, AND ITS METHOD AND FORM OF ORGANIZATION, ARE NOT LESS PRIVILEGES GRANTED BY THE STATE, NOR LESS SUBJECT TO REGULATION, THAN THAT OF ANY OTHER INSURER.

We have, in our supplementation of appellant's statement of the case under the heading: "A. Identity and nature of appellant",* discussed its form of organization. It can best be visualized as a sort of limited partnership. It has many of the characteristics of a corporation. Certainly, by reason of the legislation therein mentioned, its members for whom it carries on the business have been granted by the legislature the limited liability characteristic of corporate operation. The effectiveness of this legislation appears to be unquestioned by the California Courts. *Hansen v. Farmers Auto. Inter-Insurance Exch.*, 139 Cal. App. 388, 34 Pac. (2d) 188; *Mitchell v. Pacific Greyhound Lines, Inc.*, 33 Cal. App. (2d) 53, 91 Pac. (2d) 176. Nor has the legislative power to grant the privilege of doing business under such limitations been questioned in this Court. *Giles v. Vette*, 263 U.S. 553. This Court also has sustained legislation drastically regulating, and changing pre-existing regulations concerning, such reciprocal or interinsurance exchanges. *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313. In the *Hoopeston* case, particularly, this Court pointed out that the purported cooperative character of the organization called for no constitutional distinction between the legislative power to regulate it and the power to

*p. 2, supra.

regulate other business organizations transacting insurance business:

"The appellants earnestly insist that theirs is a successful system of cooperative insurance which gives complete security with substantial economy to their members, and that their New York subscribers may lose the benefits of this form of insurance by reason of the reciprocals' inability to comply with the requirements of the New York law. That the reciprocals save for their members from 25 to 50 per cent of the cost of ordinary commercial insurance and that the members are well satisfied with the system they have created is not controverted by counsel for the state of New York. However persuasive such arguments might be if addressed to the state legislature, they present no constitutional barrier which prevents New York from enforcing these regulations if it chooses." (318 U.S. 313, 321-322.)

In view of the decisions relating to the legislative right to enact and change the statutory provisions governing appellant's organization, taken together with the decisions previously referred to in this brief which again and again declare the insurance business to be peculiarly subject to regulation in the public interest,⁴⁵ it is respectfully submitted that the doing of business by appellant is no less a privilege granted by the state and subject to the same regulation by the State as in the case of insurers having other forms of organization.

⁴⁵See footnote 13, *supra*, and insurance cases discussed under heading: "Decisions of This Court Sustain a Broad Regulatory Power of the States Over the Insurance Business", *supra*.

V. THE DOCTRINE OF "UNCONSTITUTIONAL CONDITIONS"
IS NOT HERE INVOLVED.

Appellant would attempt to invoke the doctrine of unconstitutional conditions, claiming that the fact that appellant is now doing insurance business in the State of California gives the State no right to impose upon it a regulation, otherwise unconstitutional. None of the cases cited by appellant, nor the doctrine, holds that an exercise of the police power in the interests of the public welfare, and which reasonably tends to promote the proper objective of that welfare by appropriate means becomes unconstitutional because made a condition to doing business in the State. These cases all deal with situations where a deprivation of constitutional rights is made a condition to permission to do business in the State. (App. Br., pp. 55-59.)

If the statute here involved, taken in connection with the statutes with which it must be construed, is unconstitutional, we, of course, cannot claim that the fact that compliance is made a condition of doing an automobile liability insurance business in the State will in itself, cure the unconstitutionality. Our contention is that the purpose and objective of the statute is constitutional and the means are appropriate, not forbidden, and that therefore compliance is a reasonable condition to the permission to transact the business of automobile insurance in the State of California.

VI. COMMENT ON CERTAIN POINTS URGED AND CASES
CITED BY APPELLANT.

On page 25 of appellant's brief are cited a number of cases which purport to assert absolute freedom of contract. None of them purport to assert such freedom as against reasonable legislative regulation. Ultimately, the freedom of contract argument here must depend upon whether or not the regulation is reasonable.

On page 26 there is set forth a quotation from the case of *K. C. Working Chemical Co. v. Eureka Security Fire & M. Ins. Co.*, 82 Cal. App. (2d) 120, 131, 185 Pac. (2d) 832:

"An insurance company is not bound to accept an application or proposal for insurance but may reject it for any reason".

Despite the phraseology involved, and leaving apart the fact that a higher Court of the same State has approved the legislation here involved, a reading of the case itself shows that neither it nor the authorities therein cited dealt with legislative provisions. There have been a number of similar statements by Courts. Perhaps the best relevant comment on such pronouncements is given in a note in 107 A.L.R. 1413, in which the writer says:

"There are, as above indicated, many cases in which statements are made to the effect that an insurer is not bound to accept an application for insurance, but these cases generally do not involve express legislation on the subject and do not discuss the effect of the fact that the insurance busi-

ness is affected with a public interest." (107 A.L.R. 1413, 1424.)

Like comment is applicable to *Winship v. Bank of the U. S.*, 5 Pet. 529, at 560, *Karrick v. Hannaman*, 168 U.S. 328, and *London Assurance Co. v. Drennen*, 116 U.S. 461, 472, cited on the same page.

The point urged and the cases set forth on pages 32 and 33 of appellant's brief, contending that the authorities directly bearing on the power to compel the issuance of insurance show the statute here involved to be unconstitutional, have been discussed and answered in a previous section of this brief discussing the case of *National Fire Insurance Company v. Wanberg*, and the Texas and Massachusetts cases involving similar problems.

We have not, however, covered certain of the cases cited by appellant in its argument that there is a difference between regulation and compulsion to serve or to contract. (Br. of App., pp. 32-46.) These cases, when themselves examined, or when considered in connection with subsequent cases drastically modifying certain broad implications of the holdings in the cases themselves, do not sustain the point apparently attempted to be made by appellant, that is, that where the legitimate and proper interest of the State calls for regulation, such regulation cannot include a compulsion to service. It is argued that *Nebbia v. New York* merely subjected all business to the same broad power of regulation as that to which insurance had long been subject. With this we have no argument, but wish to

point out that the *Nebbia* case did establish beyond question that the test to be applied by the Courts under the guarantee of due process is only "that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (291 U.S. 502, 525.)

On page 35 of the brief, the citation of the *German Alliance* case is made the occasion for a remark that the case shows the difference between the power to regulate and the power to compel service. This is necessarily appellant's own interpretation—it does not withstand a reading of the case. The case actually, carefully read, merely accepts the fact that existing legislation did not grant, to the public, the power to compel service. This Court held, that, even in the absence of that power, the State could regulate and regulate drastically. The plaintiff therein contended that no regulation under the police power was valid in the absence of a right in the public to compel the service. The Court held otherwise. It did not discuss at all whether or not the public could, by legislation, be given a right to compel the service.

However, perhaps the best light upon the law which appellant would present to this Court is shown by the citation on page 37 of such cases as *Frost and Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583, 592, *Michigan Commission v. Duke*, 266 U. S. 570, and *Smith v. Cahoon*, 283 U. S. 553, 563, without also citing *Continental Baking Co. v. Woodring*, 286 U. S. 352, *Sproles v. Binford*, 286 U.S. 374, and

Steele v. General Mills, 329 U. S. 433. It is perfectly true that the cases cited by appellant on page 37 of its brief are holdings that a contract carrier cannot be compelled to become a public utility. It was the later cases, commencing with the *Continental Baking Company* case, which held that *in the interest of conservation of the highways* (an element which this Court apparently felt was absent in the prior cases), while such a contract carrier could not be made a public utility in the absence of its dedication to that purpose, it could be required to pay a ton-mile tax in common with common carriers, it could be required to carry liability insurance to protect the public (*Continental Baking Co. v. Woodring*, supra), size and load limits could be imposed upon it (*Sproles v. Binford*, supra), it could be required to obtain a permit and the permit could be denied where the efficiency of the common carrier service then adequately serving the same territory would be impaired by permitting the contract carrier to operate, and it could be required to charge the same minimum rate for carriage imposed upon the common carriers, (*Stephenson v. Binford*, 287 U.S. 251), and that despite the fact that it operated only under private contract, the rates prescribed by the Texas regulatory commission entered into those contracts and it could not charge a lower rate thereunder. (*Steele v. General Mills*, supra.) In short, this line of cases again summarizes the fact that police power legislation will be confined by this Court to the service of a proper end in the public interest, but, where such interest is shown, the doctrine of the *Nebbia* case applies.

In *Champlin Refining Co. v. United States*, 329 U. S. 29, *Roig v. People of Puerto Rico*, 147 Fed. (2d) 87, and *Fordham Bus Corporation v. United States*, 41 Fed. Supp., 712, (Br. of App. pp. 39-40), the Court merely pointed out that the statute or the administrative agency had not theretofore employed the element of compulsion to give service, and therefore that the question need not be discussed further. Traditional reluctance of the court to pass upon constitutional questions not present in the issues of the case (*Roig v. People of Puerto Rico*, 147 Fed. (2d) 87) and the like traditional reluctance of the Court to enforce personal service contracts (*Phelps-Dodge Corp. v. Labor Board*, 313 U. S. 177, 211) is here seized upon as an intimation that there is something unconstitutional about compulsion of personal service which is not at all intimated by the cases. In view of the point purported to be made, it is somewhat remarkable to find on page 40 of the brief a reference to *Lincoln Federal Labor Union v. Northwestern I. & M. Co.*, 335 U. S. 525, which upheld Nebraska and North Carolina laws, which, in one case, forbade employers to discriminate in hiring between union and non-union workers, i.e., restricted their freedom of contract and employed a compulsion to contract with the union or the non-union workers and in the other case forbade them to make contracts providing for such discrimination. The only cases cited by appellant in this section of its brief, which constitute affirmative holdings of this Court that a particular statute which compelled the making of a contract violated constitutional restrictions are

Thompson v. Consolidated Gas Co., 300 U. S. 55, cited on page 35 of appellant's brief, and the motor trucking cases cited on page 37. The motor trucking business cases we have already commented on. The *Thompson* case, on the other hand, involved a finding by the trial Court that the legislation did not serve a proper State interest and was not an appropriate measure. Of course, such an issue is not here involved.

We shall not go into much detail relating to appellant's fourth point, i.e., that even under public utility law, the statute could not compel appellant to insure non-members because that is beyond the scope of its "dedication." (Br. of App., pp. 42-55). However, there are some matters as to which comment is necessary. We find on pages 44 and 45, the common carrier truck cases cited again, without the later cases which materially modified them. We have no disagreement with the doctrine which appellant claims applies here, i.e., that a public utility cannot, in the ordinary case, be required to serve beyond the scope to which it has voluntarily dedicated itself. The answer, of course, is that given before the beginning of the century in the grain elevator cases (*Munn v. Illinois*, *Budd v. New York*, and *Brass v. Stoeser*, *supra*), reiterated in *German Alliance Insurance Co. v. Lewis*, *supra*, and again emphatically set forth in *Nebbia v. New York*, *supra*, that where the public interest in a business requires its regulation, the validity of that regulation is to be measured only by the appropriateness and reasonableness of the regulation.

The same cases pointed out that the failure to voluntarily dedicate the business to the public service was no barrier to proper regulation.

We must also reply, and that emphatically, to appellant's argument that service to the members of the California State Automobile Association is the utmost limit of appellant's dedication, and that it is a cooperative which cannot be compelled to serve any but its members. (Br. of App., pp. 46-55). In the first place, there is no evidence in the record or anywhere else, that appellant or any other insurance company has dedicated its services to any particular group. In fact, while the California Court pointed out that the only resemblance to any formal dedication was found in the law under which appellant operated (R. 193), this was merely a realistic way of calling attention to the fact that there never has been any real dedication at all. The evidence showed, for instance, that there was no dedication to the service of members of the California State Automobile Association, inasmuch as appellant declined to insure such members when it found such dedication advisable. (R. 75).

On the same basis, insurance companies which have drawn the color line, could claim that they have never dedicated their businesses to serve Negroes. Other companies could argue that they had never dedicated themselves to serve drivers who had one conviction of reckless driving against them, others that they had never dedicated their business to the service of drivers under the age of twenty-one. If that be what

appellant means by dedication, it is meaningless in this connection.

Likewise, the claim that "since its inception in 1914, appellant's power of attorney has provided that 'only members in good standing of the California State Automobile Association, or corporations or firms in which such members are officers or partners may be eligible to apply for insurance in the bureau' " is no basis for the argument that because the reciprocal law permits such restrictions in the power of attorney, this legislation is unconstitutional because it would compel appellant to change its basic charter. (Br. of App. pp. 24, 42-54). Actually, examination of the evidence shows that the restriction is not in the power of attorney, but is in the rules and regulations (R. 113, 124, 132-133) and the rules and regulations have long provided for amendment by the governing board of appellant. (R. 125, 134).

Likewise, with the argument that a cooperative may not be compelled to serve its non-members (Br. of App., pp. 52-54), we have here again the citation of *Frost Trucking Co. v. Railroad Commission*, one of the earlier of the highway trucking cases, without consideration of the modifications made by the later cases, and we have here cited a series of cases, each of which held that a trucking company carrying solely for the members of a cooperative could not be compelled to carry for others. None of these latter cases, however, refer to any constitutional objection to legislation in furtherance of a proper state interest, such as the public welfare, as in this

case, and requiring service as a means appropriate to the carrying out of the purposes of that legislation. On all cases of this type, we think that the remark of the Court in *Fordham Bus Corp. v. United States, et al.*, 41 Fed. Supp. 712, is apropos:

“* * * A private carrier cannot, says the plaintiff, be converted, by legislative fiat, into a common carrier and thereby be subject to regulations which are valid solely with respect thereto. In support of its contention, plaintiff cites such cases as *Michigan Public Utilities Commission v. Duke* * * * and *Frost Trucking Company v. Railroad Commission* * * *; cf. *Smith v. Cahoon* * * * but the basic postulate of those decisions was destroyed by the later decision in *Nebbia v. New York* * * *, which held that ‘there is no closed class or category of * * * businesses affected with a public interest.’ The court there said: ‘And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory, it does not lie with the court to determine that the rule is unwise.’ * * * It is significant that the earlier cases cited by plaintiff were also cited in the dissenting opinion in the *Nebbia* case to show that the majority opinion was inconsistent with the prior precedents.” (41 Fed. Supp. 712, 715.)

In the *Fordham Bus* case a three-judge Federal District Court sustained the Interstate Commerce Commission in classifying the Fordham Bus Company as a “common carrier” under the statute, instead of a “contract carrier” on the basis of its charter and special operations. In the same case

the court also pointed out that a number of cases there cited by plaintiff such as is true of most of the cases cited on pages 52 and 53 of appellant's brief, merely held that the trucking company was not a common carrier as that term was defined in the particular statute, rather than deciding any constitutional question. (41 Fed. Supp., 412, 716.)

Pages 54 and 59 to 60 of appellant's brief are devoted to the thesis that appellant's right to do business is not a privilege derived from the State, the argument being made that appellant not being a corporation, it does not draw its existence from the State. We have heretofore discussed in some detail appellant's organization and the laws under which it operates, and here merely refer to that discussion.⁴⁰ This is no mere association of individuals engaged in a business conducted without special and peculiar legal privileges granted by legislation. On the contrary, appellant has by its own choice elected to operate under legislation whereby its members so associating for the purpose of the business do so with as complete freedom from personal liability, or with as complete limitations of personal liability, as the policyholder of any mutual insurance corporation. Precious as is the right of freedom of association, it, also, like freedom of contract, may properly be limited by the State when used for purposes contrary to the public policy of the State.

⁴⁰See our discussion under the heading "IV. Appellant's Conduct of the Insurance Business, and Its Method and Form of Organization, Are Not Less a Privilege Granted by the State, Nor Less Subject to Regulation, Than that of Any Other Insurer", supra, p. 66, and supra, p. 2.

James v. Marinship Corporation, 25 Cal. (2d) 721, 155 Pac. (2d) 329; *Riviello v. Journeymen Barbers, etc., Union*, 88 Cal. App. (2d) 499, 199 Pac. (2d) 400.

These facts as to appellant's organization, taken together with the further fact that the business transacted is one which has traditionally been held to be affected with a public interest and subject to a broad power of State regulation would seem to constitute a conclusive answer to appellant's claim that its right to do business is not a privilege derived from the State. On the contrary, its very basis for doing business is a privilege conferred by the State, and the rules and regulations incorporated in its powers of attorney so express the agreement of its members among themselves.

CONCLUSION.

Many States have enacted legislation which creates a legal or practical compulsion upon their inhabitants to procure a particular kind of insurance as a condition precedent to engaging in a certain necessary or essential activity in that State. In a number of these States, the legislature has recognized that the free play of economic activity will not suffice to make available the insurance thereby made necessary, and has determined that its inhabitants, or a reasonably classified group of those inhabitants, are entitled to the insurance. Different States have enacted different statutory solutions to this problem. Among these

solutions have been the monopolistic State insurance fund,⁴⁷ the competitive State insurance fund,⁴⁸ the requirement that the insurers engaged in the particular field of insurance accept all applicants,⁴⁹ the requirement that rejection by one of those insurers be subject to the determination of a State board as to reasonableness,⁵⁰ the approval of a voluntary assigned risk plan,⁵¹ and the compulsory assigned risk plan here under attack by appellant⁵².

This Court and all other Courts which have passed on any of these various statutory solutions of the problem have in each case approved the particular solution before them, except in one case where the solution involved unfair discrimination between types of insurers operating in the particular field of insurance there involved.⁵³ That element of discrimination is not present here—in fact, appellant's contention as to the effect of its form of organization and peculiar "dedication" is in cold fact a plea of invalidity on the ground that there is no such discrimination here (R. 202.).

It is therefore respectfully submitted that the ends of public policy and the long stated and restated principles under which this Court acts concerning

⁴⁷*Mountain Timber Co. v. Washington*, 243 U.S. 219.

⁴⁸*New York Central Railroad v. White*, 243 U.S. 188.

⁴⁹*Texas Employers' Insurance Association v. U. S. Torpedo Co.* (Tex.), 26 S.W. (2d) 1057.

⁵⁰*In re Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681.

⁵¹California Ins. Code, Sections 1110(c), 1111-1113.

⁵²See footnote 14, *supra*.

⁵³*Employers' Liability Insurance Company v. Frost*, 48 Ariz. 402, 62 Pac. (2d) 320.

the exercise of the State's police power, call for
affirmance of the California Court's judgment in this
case.

Dated, San Francisco, California,
February 23, 1951.

Respectfully submitted,

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(Appendices A, B, C and D Follow.)

Appendix A

PROVISIONS OF CALIFORNIA STATUTES WHICH CONSTITUTE COMPULSIONS, ADDITIONAL TO NORMAL CIVIL LIABILITY FOR DAMAGES, UPON AUTOMOBILE DRIVERS TO PROCURE INSURANCE, AS THEY APPEARED IN 1948.

(a) *Vehicle Code Sections:*

402. (a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

(b) The liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant is limited to the amount of five thousand dollars (\$5,000) for the death of or injury to one person in any one accident and subject to said limit as to one person is limited to the amount of ten thousand dollars (\$10,000) with respect to the death of or injury to more than one person in any one accident and is limited to the sum of one thousand dollars (\$1,000) for damage to property of others in any one accident.

(c) In any action against an owner on account of imputed negligence as imposed by this section, the

operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this State. Upon recovery of judgment, recourse shall first be had against the property of said operator so served.

(d) In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence, such owner is subrogated to all the rights of the person injured or whose property has been injured and may recover from such operator the total amount of any judgment and costs recovered against such owner. If the bailee of an owner with the permission, express or implied, of the owner permits another to operate the motor vehicle of the owner, then such bailee and such driver shall both be deemed operators of the vehicle of the owner within the meaning of subdivisions (c) and (d) of this section.

(e) Where two or more persons are injured or killed in one accident, the owner may settle and pay any bona fide claim or claims for damages arising out of personal injuries or death, whether reduced to judgment or not, and such payments shall diminish to the extent thereof the owner's total liability on account of such accident; and payments so made aggregating the full sum of ten thousand dollars (\$10,000) shall extinguish all liability of the owner hereunder to said claimants and all other persons on account of such accident which liability may exist by reason of

imputed negligence pursuant to this section, and not arising through the negligence of the owner nor through the relationship of principal and agent or master and servant.

(f) If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee, or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of such motor vehicle. A chattel mortgage of a motor vehicle out of possession shall not be deemed an owner within the provisions of this section.

410. (a) The department shall suspend the privilege of any person to operate a motor vehicle upon a highway or the operator's or chauffeur's license issued to him evidencing such privilege, and the registration cards and license plates issued for all motor vehicles registered in the name of such person, upon receiving a copy of a judgment as hereinafter described, and a certificate of facts relative to such judgment, on a form provided by the Department, indicating that such person has failed for a period of thirty days to satisfy any final judgment rendered against him in amounts and upon a cause of action as hereinafter stated.

(b) The judgment hereinbefore referred to shall mean a final judgment of any court of competent

jurisdiction in this or any other State or of the United States against a person as defendant upon a cause of action as hereinafter stated.

(c) The judgment herein referred to shall mean any final judgment for damage to property in excess of \$100 or for damage in any amount on account of bodily injury to or death of any person resulting from the operation by said judgment debtor or any other person of any motor vehicle upon a highway except any judgment based upon statutory liability by reason of signing the application of a minor for an operator's or chauffeur's license.

(d) The suspension hereinbefore required shall remain in effect and no motor vehicle shall be registered in the name of such judgment debtor nor any license issued to such person unless and until such judgment is satisfied in full or to the extent hereinafter provided and until the judgment debtor gives proof of financial responsibility in future as hereinafter provided, subject to the exemption stated in section 411.5.

(e) A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this chapter.

410.5. The clerk of a court or the judge of a court which has no clerk shall forward to the department a certified copy of any judgment or a certified copy of the docket entries in an action resulting in a judgment for damages, and a certificate of facts relative

to such judgment, on a form provided by the department, the rendering and nonpayment of which judgment requires the department to suspend the operator's or chauffeur's license and registrations in the name of the judgment debtor hereunder, such document to be forwarded to the department immediately upon the expiration of thirty days after such judgment has become final and when such judgment has not been stayed or satisfied within the amounts specified in this chapter as shown by the records of the court.

411. Whenever after one such judgment is so satisfied and said proof of ability to respond in damages is given, another such judgment is rendered against said person for any accident occurring prior to the date of the giving of said proof and such person fails to satisfy the latter judgment within the amounts specified herein within fifteen days after the same became final, then the department shall again suspend the operator's or chauffeur's license of such judgment debtor and the registration cards and license plates issued for all motor vehicles registered in the name of such judgment debtor as owner and shall not renew the same and shall not issue to him any operator's or chauffeur's license or a registration card or license plate for any motor vehicle while such latter judgment remains unsatisfied and subsisting within the amounts specified herein.

411.5. Any person whose operator's or chauffeur's license or certificate of registration has been sus-

pended, or is about to be suspended or shall become subject to suspension under the provisions of this chapter, may relieve himself from the effect of such judgment as hereinbefore prescribed in this chapter by filing with the department an affidavit stating that at the time of the accident upon which such judgment has been rendered he was insured, that the insurer is liable to pay such judgment, and the reason, if known, why such insurance company has not paid such judgment. He shall also file the original policy of insurance or a certified copy thereof, if available, and such other documents as the department may require to show that the loss, injury or damage for which such judgment was rendered, was covered by such policy of insurance.

If the department is satisfied from such papers that such insurer was authorized to issue such policy of insurance in the State of California at the time of issuing such policy and that such insurer is liable to pay such judgment, at least to the extent and for the amounts hereinbefore provided in this chapter, the department shall not suspend such license or licenses and such certificate or certificates, or if already suspended, shall reinstate them.

413. Every such judgment shall for the purposes of this chapter be deemed satisfied:

(a) When five thousand dollars has been credited, upon any judgment, in excess of that amount, or upon all judgments, collectively, which together total in excess of that amount, for personal injury to or death of one person as a result of any one accident.

(b) When, subject to said limit of five thousand dollars as to one person, the sum of ten thousand dollars has been credited, upon any judgment in excess of that amount, or upon all judgments, collectively, which together total in excess of that amount, for personal injury to or death of more than one person as a result of any one accident.

(c) When one thousand dollars has been credited, upon any judgment in excess of that amount, or upon all judgments, collectively, each of which is in excess of one hundred dollars, and which together total in excess of one thousand dollars, for damage to property of others as a result of any one accident.

414. Proof of ability to respond in damages when required by this code means proof of ability to respond in damages resulting from the ownership or operation of a motor vehicle, and arising by reason of personal injury to, or death of, any one person, of at least five thousand dollars (\$5,000), and, subject to the limit of five thousand dollars (\$5,000) for each person injured or killed, of at least ten thousand dollars (\$10,000) for such injury to, or the death of, two or more persons in any one accident, and for damage to property in excess of one hundred dollars (\$100) or at least one thousand dollars (\$1,000) resulting from any one accident. Such proof of ability to respond in damages may be given in any manner hereinbelow.

(a) Proof of ability to respond in damages will be given by the written certificate or certificates of

any insurance carrier duly authorized to do business within the State, that it has issued to or for the benefit of the person named therein a motor vehicle liability policy or policies as defined in Section 415, which, at the date of said certificate or certificates is in full force and effect, and designated therein by explicit description or by other appropriate reference all motor vehicles with respect to which coverage is granted by the policy certified to. The department shall not accept any certificate or certificates unless the same cover all motor vehicles registered in the name of the person furnishing such proof, except that this provision shall not apply to vehicles in storage; provided, the current license plates and registration cards are surrendered to the Department of Motor Vehicles in Sacramento. Additional certificates shall be required to furnish such proof. Said certificate or certificates shall certify that the motor vehicle liability policy/or policies therein cited shall not be canceled except upon 10 days' prior written notice to the department./

(b) Proof of ability to respond in damages may be given by the bond of a surety company duly authorized to do business within the State, or a bond of individual sureties each owning unencumbered real estate, approved by a judge of a court of record. Such bond shall be conditioned for the payment of the amount specified in this section, and shall provide for the entry of judgment on motion of the State in favor of any holder of any final judgment on account

of damages to property over one hundred dollars (\$100) in amount, or injury to any person caused by the operation of such person's motor vehicle, in the same manner as provided in Section 942 of the Code of Civil Procedure for the entry of judgment upon appeal bonds.

(c) Proof of ability to respond in damages may be given by the deposit with the department by such person of eleven thousand dollars (\$11,000) which amount shall be deposited in a special deposit account with the State Controller for the purpose of this section. The department shall not accept a deposit of money where any judgment or judgments theretofore recovered against such person as a result of damages arising from the operation of any motor vehicle shall not have been paid in full.

Money heretofore deposited with the State Treasurer for the purposes set forth in this section shall be paid to the department by the State Treasurer for deposit with the State Controller for the purposes of this section.

415. (a) A "motor vehicle liability policy," as used in this code means a policy of liability insurance issued by an insurance carrier authorized to transact such business in this State to or for the benefit of the person named therein as assured, which policy shall meet the following requirements:

(1) Such policy shall designate by explicit description or by appropriate reference all motor ve-

hicles with respect to which coverage is thereby intended to be granted.

(2) Such policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured.

(3) Such policy shall insure every said person on account of the maintenance, use or operation of every motor vehicle therein covered within the continental limits of the United States against loss from the liability imposed by law arising from such maintenance, use or operation to the extent and aggregate amount, exclusive of interest and costs, with respect to each such motor vehicle, or five thousand dollars (\$5,000) for bodily injury to or death of each person as a result of any one accident and, subject to said limit as to one person, the amount of ten thousand dollars (\$10,000) for bodily injury to or death of all persons as a result of any one accident and the amount of one thousand dollars (\$1,000) for damage to property of others as a result of any one accident.

(b) Such policy shall (1) Cover the assured in the use or operation of all vehicles owned by him or registered in his name but not insuring such person when operating any motor vehicle not owned by him, or

(2) Cover the assured in the use or operation of all vehicles owned by him or registered in his name and insure such person in the operation of any motor vehicle not owned or registered in his name, or

(3) Cover the assured only in the operation of any motor vehicle not owned by him nor registered in his name, or

(4) Cover the assured only in the operation of a certain vehicle or vehicles not owned by him nor registered in his name.

(c) Any such policy may grant any lawful coverage in excess of or in addition to the coverage herein specified or contain any agreements, provisions or stipulations not in conflict with the provisions of this code and not otherwise contrary to law.

(d) Any liability policy issued hereunder need not cover any liability for injury to the assured or any liability of the assured assumed by or imposed upon said assured under any workmen's compensation law nor any liability for damage to property in charge of the assured or the assured's employees or agents.

(e) The provisions of subsection (b), parts (1) and (2), shall not apply to vehicles in storage; provided, the current license plates and registration cards are surrendered to the Department of Motor Vehicles in Sacramento.

417. The department shall upon request cancel any bond or any certificate of insurance, or the department shall direct the return to the person entitled thereto of any money or securities deposited pursuant to this code as proof of financial responsibility, or the department shall waive the requirement heretofore or hereafter imposed of filing proof of financial responsibility in any of the following events:

(a) When such person is no longer required to maintain such proof under the provisions of this code.

(b) At any time after three years from the date such proof was required when, during the three-year period immediately preceding the request, the person required to furnish such proof: (1) has not been convicted of any offense authorizing or requiring the suspension or revocation of a license by the department, and (2) has not suffered suspension or revocation of license upon order of the department or a court arising from a conviction of a violation of the law.

(c) Upon the death of the person on whose behalf such proof was filed.

(d) In the event of the permanent incapacity of such person to operate a motor vehicle if such person surrenders for cancellation his operator's or chauffeur's license and, if suspended under the provisions of Section 410 of this code, the registration cards and license plates issued for all motor vehicles registered in his name to the department.

(e) The department shall not release such proof: (1) if any action for damages upon a liability referred to in this code is then pending, or (2) if any judgment upon such liability is outstanding and unsatisfied.

(f) An affidavit of the applicant of the nonexistence of such facts shall be prima facie evidence thereof.

418. (a) The department shall cancel any bond or any certificate of insurance or direct the return of any money or securities to the person entitled thereto, upon the substitution and acceptance of other adequate proof of ability to respond in damages pursuant to this code.

(b) Whenever any evidence of (or) proof of ability to respond in damages filed by any person under the provisions of this code no longer fulfills the purpose for which required the department shall, for the purpose of this code, require other evidence of ability to respond in damages as required by this code, and shall suspend the privilege of such person to operate a motor vehicle upon a highway or the operator's or chauffeur's license issued to him evidencing such privilege. Such suspension shall also include the registration card and license plates issued for all motor vehicles registered in the name of such person; provided, the original suspension resulted from an unsatisfied judgment. Such suspension shall remain in effect until adequate proof of ability to respond in damages shall have been filed with the department by such person.

419. (a) The operator of every motor vehicle which is in any manner involved in an accident within this State, in which any person is killed or injured, or in which damage to the property of any one person, including himself, in excess of one hundred dollars (\$100) is sustained, shall within 10 days after such accident report the matter in writing to the department. If such operator be physically incapable of

making such report, and is not the owner of the motor vehicle involved in such accident then the owner shall, as soon as he learns of the accident, report the matter in writing to the department. The operator or the owner shall make such other and additional reports relating to such accident as the department shall require.

(b) The department shall suspend the license or any nonresident's operating privilege of any person who wilfully fails, refuses, or neglects to make report of a traffic accident as herein required.

420. (a) The department shall, within 60 days after the receipt of a report of a motor vehicle accident within this State which has resulted in bodily injury or death or damage to the property of any one person in excess of one hundred dollars (\$100), suspend the license of each operator of a motor vehicle in any manner involved in such accident, and if such operator is a nonresident the privilege of operating a motor vehicle within this State, unless such operator shall deposit security in a sum which shall be sufficient in the judgment of the department to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against such operator or owner. Notice of such suspension shall be sent by the department to such operator not less than 10 days prior to the effective date of such suspension and shall state the amount required as security.

(b) Subdivision (a) shall not apply under the conditions stated in Section 420.1 or to any of the following:

(1) To such operator if the owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;

(2) To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him;

(3) To such operator if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the department, covered by any other form of liability insurance policy or bond; or

(4) To any person qualifying as a self-insurer under Section 420.7.

(c) No such policy or bond shall be effective under this section unless issued by an insurance company or surety company authorized to do business in this State, except that if such motor vehicle was not registered in this State, or was a motor vehicle which was registered elsewhere than in this State at the effective date of the policy or bond, or the most recent renewal thereof, such policy or bond shall not be effective under this section unless the insurance company or surety company, if not authorized to do business in this State, shall execute a power of attorney authorizing the director to accept service on its behalf of notice or process in any action upon such policy or bond arising out of such accident; provided, however,

every such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than five thousand dollars (\$5,000) because of bodily injury to or death of one person in any one accident and subject to said limit for one person, to a limit of not less than ten thousand dollars (\$10,000) because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, to a limit of not less than one thousand dollars (\$1,000) because of injury to or destruction of property of others in any one accident.

(d) Upon receipt of notice of such accident, the insurance company or surety company which issued such policy or bond shall furnish for filing with the department a written notice that such policy or bond was in effect at the time of such accident.

420.1 The requirements as to security and suspension in Section 420 shall not apply.

(a) To the operator of a motor vehicle involved in an accident wherein no injury or damage was caused to the person or property of any one other than such operator or owner.

(b) To the operator of a motor vehicle if at the time of the accident the vehicle was stopped, standing, or parked, whether attended or unattended, except that the requirements of this act shall apply in the event the department determines that any such stopping, standing, or parking of the vehicle was illegal or that the vehicle was not equipped with lighted lamps or illuminating devices when and as required

by the laws of this State and that any such violation contributed to the accident.

(c) If, prior to the date that the department would otherwise suspend the license or nonresident's operating privilege under Section 420, there shall be filed with the department evidence satisfactory to it that the person who would otherwise have to file security has been released from liability or been finally adjudicated not to be liable or has executed a confession of judgment, payable when and in such installments as the parties have agreed to, or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments, with respect to all claims for injuries or damages resulting from the accident.

420.2. The license and nonresident's operating privilege suspended as provided in Section 420 shall remain so suspended and shall not be renewed nor shall any such license be issued to such person until:

(a) Such person shall deposit or there shall be deposited on his behalf the security required under Section 420; or

(b) One year shall have elapsed following the date of such accident and evidence satisfactory to the department has been filed with it that during such period no action for damages arising out of such accident has been instituted; or

(c) Evidence satisfactory to the department has been filed with it of a release from liability, or a final adjudication of nonliability, or a confession of judg-

ment, or a duly acknowledged written agreement, in accordance with subdivision (c) of Section 420.1; provided, however, in the event there shall be any default in the payment of any installment under any confession of judgment, then, upon notice of such default the department shall forthwith suspend the license or nonresident's operating privilege of such person defaulting, which shall not be restored unless and until the entire amount provided for in said confession of judgment has been paid; and provided, further, that in the event there shall be any default in the payment of any installment under any duly acknowledged written agreement, then, upon notice of such default, the department shall forthwith suspend the license or nonresident's operating privilege of such person defaulting, which shall not be restored unless and until (1) such person deposits and thereafter maintains security as required under Section 420 in such amount as the department may then determine, or (2) one year shall have elapsed following the date when such security was required and during such period no action upon such agreement has been instituted in a court in this State.

420.3. In case the operator of a motor vehicle involved in an accident within this State has no valid California license he shall not be allowed a license until he has complied with the requirements of this chapter to the same extent that would be necessary if, at the time of the accident, he had held a license.

420.4. (a) The security required under this chapter shall be in such form and in such amount as the de-

partment may require but in no case in excess of the limits specified in Section 420(c) in reference to the acceptable limits of a policy or bond. The person depositing security shall specify in writing the person or persons on whose behalf the deposit is made and, at any time while such deposit is in custody of the department or other proper state officer, the person depositing it may, in writing, amend the specification of the person or persons on whose behalf the deposit is made to include an additional person or persons; provided, however, that a single deposit of security shall be applicable only on behalf of persons required to furnish security because of the same accident.

(b) The department may reduce the amount of security ordered in any case within six months after the date of the accident if, in its judgment, the amount ordered is excessive. In case the security originally ordered has been deposited, the excess deposited over the reduced amount ordered shall be returned to the depositor or his personal representative forthwith, notwithstanding the provisions of Section 420.5.

420.5. Where security deposited in compliance with the requirements of this chapter is in the form of cash, it shall be deposited by the department in a special deposit account with the State Controller for the purposes of this section. Security in any other form shall be placed in the custody of the State Treasurer. Such security, whether deposited with the State Controller or the State Treasurer, shall be applicable to the payment of a judgment or judgments rendered against the person or persons on whose behalf the deposit was

made, for damages arising out of the accident in question in an action at law, begun not later than one year after the date of such accident, or within one year after the date of deposit of any security under subdivision (c) of Section 420.2. Such security shall also be available for the settlement of any claims arising out of the accident in question or agreed upon in writing by the person or persons depositing such security. Such security on deposit or any balance thereof shall be returned to the depositor or his personal representative when evidence satisfactory to the department has been filed with it that there has been a release from liability, or a final adjudication of a nonliability, or a confession of judgment, or a duly acknowledged agreement, in accordance with subdivision (c) of Section 420.1, or whenever, after the expiration of one year from the date of the accident, or within one year after the date of deposit of any security under subdivision (c) or Section 420.2, the department shall be given reasonable evidence that there is no such action pending and no judgment rendered in such action left unpaid.

420.6. The foregoing provisions of this chapter shall not apply with respect to operation of any motor vehicle owned by the United States, this State, or any political subdivision of this State, or municipality thereof; nor, except for Section 419, to any person qualifying as a self-insurer under Section 420.7.

This chapter shall not apply with respect to operation of any vehicle owned or operated by a carrier subject to the jurisdiction of the Public Utilities Com-

mission of the State of California of the Interstate Commerce Commission.

420.7. (a) Any person in whose name more than 25 motor vehicles are registered may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the department as provided in subsection (b) of this section.

(b) The department may, in its discretion, upon the application of such a person, issue a certificate of self-insurance when it is satisfied that such person is possessed and will continue to be possessed of ability to pay judgments obtained against such person.

(c) Any person duly qualified under the laws or ordinances of any city, city and county or county in this State to act as self-insurer and then acting as such, shall upon filing with the department satisfactory evidence thereof, be entitled to receive a certificate of self-insurance.

(d) Upon not less than five days' notice and a hearing pursuant to such notice, the department may upon reasonable grounds cancel a certificate of self-insurance. Failure to pay any judgment within 30 days after such judgment shall constitute a reasonable ground for the cancellation of a certificate of self-insurance.

420.8. Neither the report required by Section 419, the action taken by the department pursuant to this chapter, the findings, if any, of the department upon which action is based, nor the security filed as provided in this chapter shall be referred to in any way,

or be any evidence of the negligence or due care of either party, at the trial of any action at law to recover damages.

420.9. The director is hereby authorized to adopt and enforce such regulations as may be necessary for the administration of this chapter.

(b) Sections of general laws:

City Carriers' Act (Deering's General Laws of California, No. 5134).

Sec. 4. The Railroad Commission shall, in granting permits under the provisions of this act, require the carrier to procure, and continue in effect during the life of the permit, adequate protection, as required in section 5 hereof, against liability imposed by law upon such carrier for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than five thousand dollars on account of bodily injuries to, or death of, one person; and protection against a total liability of such carrier on account of bodily injuries to, or death of, more than one person, as a result of any one accident, in the amount of not less than ten thousand dollars; and protection in an amount of not less than five thousand dollars for one accident resulting in damage or destruction of property whether the property of one, or more than one claimant. (Cal. Stats. 1935, ch. 312, p. 1057.)

Sec. 5. The protection required under section 4 shall be evidenced by the deposit with the Railroad Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance, issued by a company licensed to write surety bonds in the State of California; or of a personal bond, with such sureties as the Railroad Commission shall find adequate to guarantee the protection prescribed in section 4 hereof; or it shall be evidenced by a trust fund in the amount of fifteen thousand dollars, to be held in trust by some institution or person acceptable to the Railroad Commission; or by a combination of any or all of said methods in such manner that the aggregate of the protection or funds available therefor shall equal the principal sum of not less than fifteen thousand dollars, and such carrier shall have the option of the method to be used in obtaining such protection, and may change from one method to another, from time to time, with the consent of the Railroad Commission. (Cal. Stats. 1935, ch. 312, p. 1057.)

Sec. 6. The protection against liability as outlined in section 4 hereof must be continued in effect during the line of the permit, and the policy of insurance, surety bond or personal bond shall not be cancellable on less than ten (10) days' written notice to the Railroad Commission. The Railroad Commission shall have the power to establish such rules and regulations as may be necessary to carry out the provisions of sections 4 to 5, inclusive. (Cal. Stats. 1935, ch. 312, p. 1057.)

(Deering's General Laws of California, No. 5129a.)

Sec. 5. The Railroad Commission shall, in granting permits under the provisions of this act, require the highway carrier to procure, and continue in effect during the life of the permit, adequate protection, as required in section 6 hereof, against liability imposed by law upon such highway carrier for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than five thousand dollars on account of bodily injuries to, or death of, one person; and protection against a total liability of such highway carrier on account of bodily injuries to, or death of, more than one person, as a result of any one accident, in the amount of not less than ten thousand dollars; and protection in an amount of not less than five thousand dollars for one accident resulting in damage or destruction of property whether the property of one, or more than one claimant. (Cal. Stats. 1935, ch. 312, p. 878.)

Sec. 6. The protection required under section 5 shall be evidenced by the deposit with the Railroad Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance; issued by a company licensed to write such insurance in the State of California; or of a bond of a surety company licensed to write surety bonds in the State of California; or of a personal bond, with such sureties as the Railroad Commission shall find adequate to guarantee the protection prescribed in section 5 hereof;

or it shall be evidenced by a trust fund in the amount of fifteen thousand dollars, to be held in trust by some institution or person acceptable to the Railroad Commission; or by a combination of any of or all of said methods in such manner that the aggregate of the protection or funds available therefor shall equal the principal sum of not less than fifteen thousand dollars, and such highway carrier shall have the option of the method to be used in obtaining such protection, and may change from one method to another from time to time, with the consent of the Railroad Commission. With the consent of the Railroad Commission a copy of an insurance policy, duly certified by the company issuing it to be a true copy of the original policy, or a photostatic copy thereof, or an abstract of the provisions of said policy, or a certificate of insurance issued by the company issuing such policy, may be filed with the Railroad Commission in lieu of the original or a duplicate or counterpart of said policy. (Cal. Stats. 1935, ch. 312, p. 878, as Am. Cal. Stats. 1937, ch. 722, p. 2008.)

Sec. 7. The protection against liability as outlined in section 5 hereof must be continued in effect during the active life of the permit, and the policy of insurance, surety bond or personal bond shall be not cancellable on less than ten (10) days' written notice to the Railroad Commission. The Railroad Commission shall have power to establish such rules and regulations as may be necessary to carry out the provisions of sections 5 to 7, inclusive. (Cal. Stats. 1935, ch. 312, p. 878, Am. Cal. Stats. 1937, ch. 722, p. 2009.)

Appendix B**NOTICE AND RULING OF CALIFORNIA INSURANCE COMMISSIONER RE SURCHARGES ON PREMIUM ON ASSIGNED RISKS.**

TO: ALL INSURERS ADMITTED TO TRANSACT LIABILITY INSURANCE AND ALL INTERESTED PERSONS

RE: NOTICE OF PUBLIC HEARINGS ON PROPOSED AMENDMENTS TO RULES AND REGULATIONS

Notice is hereby given that Public Hearings will be held by the Insurance Commissioner at his office at 1182 Market Street, San Francisco, California at 10:00 A.M. on Monday, December 18, 1950 and at his office at 621 South Hope Street, Los Angeles, California at 10:00 A.M. on Thursday, December 21, 1950, to determine, pursuant to Section 11620 of the Insurance Code of the State of California (as amended by statutes of 1947, Chapter 1287) whether proposed amendments to the California Automobile Assigned Risk Plan, a part of the Rules and Regulations of the Insurance Commissioner, contained in Article 8, subchapter 3, Chapter 5, Title 10 of the California Administrative Code, are in keeping with the intent and purpose of said Section 11620.

The Governing Committee of the California Automobile Assigned Risk Plan has petitioned the Insurance Commissioner for a certain amendment to the California Automobile Assigned Risk Plan in which it is proposed to amend Section 2460 thereof to provide as follows:

"Section 2460. Each risk assigned under this Plan shall be subject to the rules, rates, minimum premiums, rating plans and classifications which the insurer to which such assignment is made normally applies in this state to risks not subject to the Plan, but such insurer may make a uniform additional charge of 10% for long-haul trucking risks and 15% for others if the applicant or anyone who normally or usually drives the motor vehicle

- (a) is required to file proof of ability to respond to damages as provided by the Vehicle Code, or,
- (b) during the 36 months immediately preceding the date of application for assignment, and, in case of renewal, during the 36 months immediately preceding the effective date of the renewal policy, has been convicted of any offense listed in Sections 2431 or 2431.1 of the Plan."

At such Hearings any interested person or his authorized representative, or both, will be afforded the opportunity to present, orally or in writing, statements, arguments or contentions.

Dated, November 28, 1950.

Wallace K. Downey,
Insurance Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE

Ruling No. 61.

TO ALL INSURERS ADMITTED TO TRANSACT LIABILITY
INSURANCE:

SUBJECT: AMENDMENTS TO THE RULES AND REGU-
LATIONS OF THE INSURANCE COMMISSIONER
RELATING TO THE CALIFORNIA AUTOMO-
BILE ASSIGNED RISK PLAN.

Effective April 15, 1951, the Rules and Regulations of the Insurance Commissioner relating to the California Automobile Assigned Risk Plan contained in Article 8, subchapter 3, Chapter 5, Title 10 of the California Administrative Code, are hereby amended as follows:

Section 2460 is hereby amended to provide as follows:

"2460. Each risk assigned under this Plan shall be subject to the rules, rates, minimum premiums, rating plans and classifications which the insurer to which such assignment is made normally applies in this State to risks not subject to the Plan, but such insurer may make a uniform additional charge of 10% for long-haul trucking risks and 15% for others if the applicant or anyone who normally or usually drives the motor vehicle

(a) is required to file proof of ability to respond in damages as provided by the Vehicle Code; or

- (b) during the 36 months immediately preceding the date of application for assignment, and, in the case of renewal, during the 36 months immediately preceding the effective date of the renewal policy, has been convicted of any offense listed in Sections 2431 or 2431.1 of the Plan."

John R. Maloney
Insurance Commissioner

San Francisco, California
January 5, 1951

Appendix C

CALIFORNIA INSURANCE CODE SECTIONS LIMITING PERSONAL LIABILITY OF MEMBERS OF RECIPROCAL OR INTERINSURANCE EXCHANGES IN CALIFORNIA.

1398. The power of attorney of an exchange subject to this article may limit the contingent liability of the subscriber for assessment, but such contingent liability shall not be less than an amount equal to and in addition to the amount of the premium deposit provided in the policy.

1401. If an exchange subject to this article has a surplus of admitted assets over all liabilities in a sum equal to one and one-half times the minimum paid-in capital required of incorporated insurers issuing policies on a reserve basis and doing the same classes of insurance, then the Insurance Commissioner, upon written request, shall issue his certificate stating such fact. Subscribers at an exchange so certified shall have no liability for assessment on policies issued while such certificate remains in effect. Whenever the Commissioner finds such fact does not exist, he shall revoke and require the surrender of his certificate. Upon revocation of such certificate no policy shall thereafter be issued nor be permitted to remain in force beyond the date fixed for the next payment of premium without written indorsement thereon providing for assessment liability in accordance with the terms of this chapter.

Appendix D

CALIFORNIA INSURANCE CODE SECTIONS PROVIDING FOR "THIRD PARTY ACTION" AGAINST LIABILITY INSURANCE CARRIER.

11580. A policy insuring against losses set forth in subdivision (a) shall not be issued or delivered to any person in this State unless it contains the provisions set forth in subdivision (b). Such policy, whether or not actually containing such provisions, shall be construed as if such provisions were embodied therein.

(a) Unless it contains such provisions, the following policies of insurance shall not be thus issued or delivered:

(1) Against loss or damage resulting from liability for injuries suffered by another person other than a policy of workmen's compensation insurance.

(2) Against loss of or damage to property caused by draught animals or any vehicle, and for which the insured is liable.

(b) Such policy shall not be thus issued or delivered to any person in this State unless it contains all the following provisions:

(1) A provision that the insolvency or bankruptcy of the insured will not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy.

(2) A provision that whenever judgment is secured against the insured in an action brought by the

injured person, or by his heirs or personal representatives in case death results from the accident, then an action may be brought against the insurer, on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment.

11581. Upon any proceeding supplementary to execution, such judgment debtor may be required to exhibit any policy carried by him, insuring him against the liability for the loss or damage for which judgment was obtained.

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MAR 5 1951

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1950

No. 310

CALIFORNIA STATE AUTOMOBILE ASSOCIATION,
INTER-INSURANCE BUREAU,

Appellant,

against

WALLACE K. DOWNEY, Insurance Commissioner of the
State of California,

Appellee.

APPLICATION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE AND BRIEF OF
STATE OF NEW YORK

NATHANIEL L. GOLDSTEIN,
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Supreme Court of the United States

OCTOBER TERM, 1950

No. 310


CALIFORNIA STATE AUTOMOBILE ASSOCIATION,
INTER-INSURANCE BUREAU,

Appellant,

against

WALLACE K. DOWNEY, Insurance Commissioner of the
State of California,

Appellee.

APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF STATE OF NEW YORK

Now comes the State of New York, by its Attorney General, and respectfully begs leave of the Court to submit the subjoined brief as *amicus curiae* upon the above-entitled appeal.

BRIEF FOR THE STATE OF NEW YORK AS AMICUS CURIAE

Statement

This case presents the issue of the constitutional validity of a California statute and of the plan promulgated pursuant thereto for apportionment among and assignment to insurers authorized to transact motor vehicle liability insurance of applicants entitled in good faith to such

coverage but unable to procure it by ordinary means. Such assigned risk plan is particularly assailed in its application to a reciprocal inter-insurance bureau which individually confines its operations to members of an automobile association.

The Interest of the State of New York

The New York Insurance Law contains in Section 63 the following provision:

"§ 63. Assigned risk plans

"The superintendent shall, after consultation with the insurers licensed to write motor vehicle liability insurance in this state, approve a reasonable plan or plans for the equitable apportionment among such insurers of applicants for such insurance who are in good faith entitled to but are unable to procure insurance through ordinary methods and, when such plan has been approved, all such insurers shall subscribe thereto and shall participate therein. Any applicant for such insurance, any person insured under such plan and any insurer affected may appeal to the superintendent from any ruling or decision of the manager or committee designated to operate such plan. All orders of the superintendent shall be subject to judicial review as provided in section thirty-three of this chapter. Added L. 1946, c. 467, eff. July 1, 1946."

In 1929 (Chapter 695) a new Article 6-A, entitled "Financial Responsibility for Operation of Motor Vehicles," had been added to the Vehicle and Traffic Law. Because of the constantly increasing use of motor vehicles and the attendant danger to the public, privately operated cars were subjected to a measure of the same regulation as those operated for hire. Compulsory proof of financial responsibility was not required until, after an accident, a judgment for damages remained unsatisfied. Thereafter, proof of ability to respond in damages was required in order to obtain restoration of operators' licenses and registrations suspended in

accordance with the statute (§ 94-b). No license or registration could be suspended, however, where an insurance policy or bond under Section 17 was in effect or where the owner was insured by a policy against liability for personal injury and property damage within given limits. This was sustained as reasonable enforcement of a proper public policy (*Reitz v. Mealey*, 314 U. S. 33).

In 1940 the question of enacting a compulsory automobile insurance law was raised because of general agreement that some further measure was necessary. Ultimately a less drastic bill was introduced in 1941. At that time the question of whether provision for an assigned risk bureau should be included was raised but was omitted on assurance that a voluntary assigned risk bureau would be put in operation (Report of Joint Legislative Committee on Recodification of the Insurance Law, Leg. Doc. [1941] No. 73, pp. 5, 6).

The new bill was signed by the Governor on April 2, 1941 (L. 1941, c. 872), and New York was "committed to a trial" of a safety responsibility law rather than compulsory insurance. An assigned risk plan had meanwhile been put in operation (Report of the Joint Legislative Committee on Revision of the Insurance Law, Leg. Doc. [1942] No. 68, pp. 51, 52).

The new Article 6-A of the Vehicle and Traffic Law, enacted by Chapter 872 of the Laws of 1941, generally revised the former financial responsibility provisions and adapted them to the needs revealed by experience in their administration. Under Section 94-e thereof, as amended, suspension of the license of any person operating and of the registration of any person owning a motor vehicle in any manner involved in an accident resulting in injury or death, or property damage in excess of \$50.00, is required unless and until sufficient security to satisfy any resulting

judgment and proof of further financial responsibility is furnished by such operator or owner, or both. This section, however, is not applicable to any owner or operator if the owner at the time of the accident had in effect with respect to the motor vehicle an insurance policy covering possible liability within limits fixed by the statute, nor is it applicable to an operator not the owner if there was in effect a policy covering his operation of vehicles not owned by him. It is still only following an accident that proof of responsibility, by an insurance policy or otherwise, is compulsory in order to retain the privilege of operating or having registered a private motor vehicle, but the statute still precludes any interference with the privileges of one who already had in effect a satisfactory liability policy or with motor vehicles required to be insured under Section 17 (§§ 94-e and 94-ff).

The statutory requirement for an assigned risk plan was specifically enacted in 1946 pursuant to recommendation of the Superintendent of Insurance in his Eighty-Seventh Annual Report (Leg. Doc. [1946] No. 73, p. 57-a) as "an essential part of any comprehensive financial responsibility plan" and to overcome the shortcomings of the voluntary plan arising from the lack of legal sanction.

Like California's, the New York Plan was necessitated by laws implementing the public policy of the State to require security for the responsibility of those operating motor vehicles. Also like California's, it was adopted only after trial of a voluntary plan when the need for express legislative sanction became apparent. The New York Plan has been in successful operation without question of its validity. It forms a necessary mechanism incident to the Safety Responsibility Law which is now imbedded in the public policy of the State. The State is vitally concerned that the responsibility of authorized insurers thus to contribute

to their function of spreading and minimizing risk shall not be cast in doubt.

It is apparent that financial responsibility provisions like those of California and New York tend to induce many more persons to procure insurance even in advance of accident than would otherwise do so. It is an inescapable consequence that the base for distribution of the actual risk has been greatly broadened and the total business has been increased. The Assigned Risk Plan merely compels those who have sought the privilege of doing business in this field of insurance to accept, on the basis of a fair apportionment, the burdens as well as the benefits accruing to insurers from an enforcement of a valid public policy which induces and compels the procurement of insurance as proof of financial responsibility.

ARGUMENT

A state may validly require insurers as a condition of continuing authority to do business to subscribe to a plan for the equitable apportionment of risks of the kind required by its motor vehicle financial responsibility law.

Long before *Nebbia v. New York*, 291 U. S. 502, discarded artificial restraints, implicit in the phrase "businesses affected with a public interest", upon State power to make regulations bearing upon property and contract rights in the conduct of business, this Court had recognized the peculiar and extended scope of State authority with respect to the business of insurance. In *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, legislative regulation of insurance rates was upheld against the contention that the business of insurance was so far a private right that it "cannot be compelled nor can any of its exercises be compelled".

The Court recognized that the business was done through personal contracts of indemnity but found their effects to extend so far beyond the concerns of the immediate parties as to impose upon the business a public concern invoking public regulation. It was denied that the right to engage in the business was a natural one and recognized that it could be denied to individuals while permitted to corporations. The extent of the regulations which could be imposed were said to deny it the character and privilege of "a private business" (232 U. S., at p. 416).

In expounding its thesis, the Court said:

"The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country; the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax. Their efficiency, therefore, and solvency are of great concern. The other objects, direct and indirect, of insurance we need not mention. Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it and we need not dispute with the economist that this is the result of the 'substitution of certain for uncertain loss' or the diffusion of positive loss over a large group of persons, as we have already said to be certainly one of its effects. We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and; governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the

individuals. We may say in passing that when the effect goes beyond that, there are many examples of regulation. *Holden v. Hardy*, 169 U. S. 366; *Griffith v. Connecticut*, 218 U. S. 563; *Muller v. Oregon*, 208 U. S. 412; *Mutual Loan Co. v. Martell*, 222 U. S. 225; *Schmidinger v. Chicago*, 226 U. S. 578; *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549; *Noble State Bank v. Haskell*, 219 U. S. 104." (p. 412)

Again it said with particular reference to the importance of insurance to the insured:

"The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern." (pp. 414-415)

(See also, *United States v. Southeastern Underwriters*, 322 U. S. 533, 540.)

It was for the purpose of making insurance available to those who might otherwise be prevented from obtaining it that the Kansas statute involved in the *German Alliance* case was upheld. The Court said:

"It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation

by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power." (p. 417)

It is established, we submit, that the business of insurance is inherently of such intimate concern to the public that those who seek the privilege of engaging in it subject themselves to the greatest degree of public control in order that the protection which is its basic purpose may be obtained.

As part of its concededly valid policy relating to financial responsibility of motor vehicle operators, the State has accepted insurance as proof thereof. It has induced many persons and compelled many others to furnish such proof. In doing so it has greatly increased the demand for the protection which insurance is designed to give and spread the risk over a proportionately larger part of the public which ultimately pays the cost through rates subject to adjustment at the behest of the insurers. Normally, insurers seek those risks least likely to cause loss but if there were no risk, there would be no need for insurance. If those impelled or compelled by law to seek insurance cannot obtain it, the public function of insurers to divide and spread loss would not be fulfilled. If those risks not willingly accepted cannot be fairly apportioned among all insurers, the incidence of the risk will bear on some to the unfair advantage of others.

Insurers do not engage in that business as a matter of common right. They may do so only with the permission of the State and subject to public control. The regulation of such an activity includes power to impose conditions

which might not otherwise be admissible (*Packard v. Banton*, 264 U. S. 140, 145). Assigned risk plans of the kind here involved are a method for distribution on a fair and impartial basis of a part of the public responsibility imposed upon those who have sought the license of the State and taken it subject to the power of the State.

Hoopeston Canning Co. v. Cullen, 318 U. S. 313, establishes that reciprocal insurers do not remove themselves from the jurisdiction or power of a state by the technical peculiarities of their method of furnishing insurance protection. Neither, we submit, can that result follow from voluntary limitations upon the scope of the business which such an insurer wishes to do. The authority sought and obtained is not based on such limitations and they cannot be invoked to give one insurer an advantage over others having the authority to write the same kind of coverage.

It is respectfully submitted that assigned risk plans of the kind involved in this appeal should be held to be in all respects valid and constitutional.

Dated, March 1, 1951.

Respectfully submitted,

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